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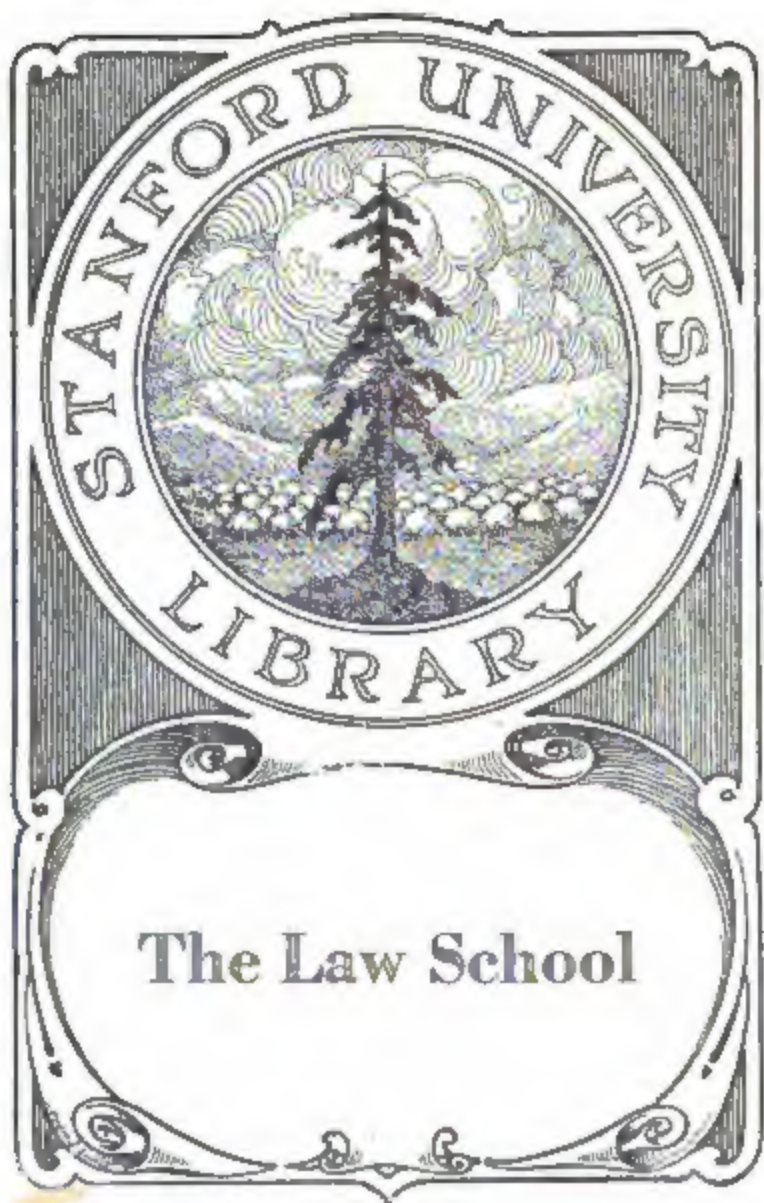
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REPORTS OF CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1903.

[UNOFFICIAL.]

VOLUME IV.

HARRY C. LINDSAY,

REPORTER.

LINCOLN, NEB.:
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In behalf of the people of Nebraska.

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SUPREME COURT

1903.

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† During 1903, when the opinions in this volume were filed, the officers were the same as given in volume 3 of this series.

‡ 1905. § 1904 and 1905.

In the cases reported in this series the court has approved the conclusion reached, and adopted the recommendation made as a correct disposition of the particular case in which the decision is rendered. They are unofficial in the sense that the court has not necessarily approved all of the propositions of law advanced as indicated either in the syllabi or in the opinions themselves.

LAW ESTABLISHING THE SUPREME COURT COMMISSION.

Laws, 1901, chapter 25, page 331.
Compiled Statutes, 1903, chapter 19, sections 22e to 22k.

SECTION 1. The Supreme Court of this State, is hereby authorized to appoint by the unanimous vote and order of the Judges of said Court, nine (9) Commissioners of said Court and such stenographers as the Court may, from time to time, deem necessary for the aid of such Commissioners.

SECTION 2. No person shall be appointed as such Commissioner who is not a practicing lawyer in good standing, possessing the qualifications required for the office of Judge of the Supreme Court of this State, and none of said Commissioners shall practice law while holding such position.

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* * * * *

SECTION 6. All vacancies occurring in the position of Commissioners or stenographers therefor, shall be filled in like manner as an original appointment.

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SECTION 8. Whereas, an emergency exists, this Act shall take effect and be in force from and after its passage and approval.

Approved March 19, 1901.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF NEBRASKA.
JANUARY TERM, A. D. 1903.

PRESENT:

HON. J. J. SULLIVAN, CHIEF JUSTICE.
HON. SILAS A. HOLCOMB,
HON. SAMUEL H. SEDGWICK, } JUDGES.

DEPARTMENT No. 1.*

HON. WILLIAM G. HASTINGS,
HON. CHARLES S. LOBINGIER,†
HON. RICHARD C. GLANVILLE,‡
HON. JOHN S. KIRKPATRICK,

DEPARTMENT No. 2.*

HON. JOHN B. BARNES,
HON. WILLIS D. OLDHAM
HON. ROSCOE POUND,

DEPARTMENT No. 3.*

HON. EDWARD R. DUFFIE
HON. JOHN H. AMES,
HON. I. L. ALBERT,

COMMISSIONERS.

**JOSEPH F. PARKINS V. THE MISSOURI PACIFIC RAILWAY
COMPANY. §**

FILED JANUARY 8, 1903. No. 12,431.

Commissioner's opinion. Department No. 2.

- 1. Contracts: BREACH: DAMAGES: DEFENSE: APPEAL AND ERROR. In an action to recover damages for an alleged breach of contract, where the defense interposed is a termination of the agreement, according to the terms and in the manner provided for therein,**

*April 10, 1903, the commission was reorganized as follows:
Department No. 1—John H. Ames, William G. Hastings, Willis D. Oldham.
Department No. 2—I. L. Albert, John B. Barnes, Richard C. Glanville.
Department No. 3—Edward R. Duffie, John S. Kirkpatrick, Roscoe Pound.

† Until April 9, 1903.

‡ After April 9, 1903.

§ Pending on second motion for rehearing. See post, page 910.

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the verdict of a jury will not be set aside unless it is unsupported by the evidence and is clearly wrong.

2. Trial: INSTRUCTIONS: PLEADINGS COPIED INTO: APPEAL AND ERROR. In instructing juries, the practice of copying the pleadings in order to state the issues to be determined is not to be commended. It might confuse the jury, where the issues are numerous and the pleadings complicated; but unless we can fairly say that such was the result a verdict will not be set aside for instructing in that manner.

3. Trial: INSTRUCTIONS: ESTOPPEL TO COMPLAIN. One cannot complain because an instruction is too general in its nature, unless he has requested the court to give one which is more explicit and the same has been refused. *Carter White Lead Co. v. Kinlin*, 47 Neb., 409; *Barr v. City of Omaha*, 42 Neb., 341.

4. Trial: INSTRUCTIONS: ESTOPPEL TO COMPLAIN. A party cannot complain of an instruction for stating an issue therein which was properly made by the pleadings, and which was accepted and tried without objection on his part.

5. Contracts: BREACH: TRIAL: INSTRUCTIONS APPROVED. Instructions examined, and held that they were properly given and fairly submitted the case to the jury.

6. Appeal and Error: ASSIGNMENTS: EVIDENCE. Assignments of error on account of receiving and rejecting evidence, although too general to require consideration, examined, and held not to contain reversible error.

7. Trial: MISCONDUCT: OF JUROR: KNOWN TO PARTY: DISCLOSURE: ESTOPPEL TO COMPLAIN. A party having knowledge of facts, during the trial of a cause, which he claims constitute misconduct on the part of a juror, must make the same known to the court at once, and have the matter promptly disposed of. This he must do as a matter of good faith, and he will not be permitted to withhold such knowledge from the court during the trial, allow the case to be submitted to a jury and thus speculate upon the verdict. By such conduct he will be held to have waived his right to a new trial on that ground, unless he satisfy the court that the juror, as a matter of fact, was prejudiced against him thereby, and could not render a fair and impartial verdict in the case.

ERROR from the district court for Sarpy county. Tried below before SLABAUGH, J. *Affirmed.*

F. T. Ransom and Weaver & Giller, for plaintiff in error.

H. C. Lefler, John F. Stout, James W. Orr and B. P. Waggener, contra.

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BARNES, C.

The plaintiff commenced this action in the district court for Sarpy county, to recover damages for a breach of the following contract, to wit:

"This agreement made this 5th day of October, 1892, by and between the Missouri Pacific Railway Company, party of the first part, and Joseph F. Parkins, lessee of the Springfield Gravel Company, party of the second part, witnesseth:

"That the said party of the second part agrees to deliver to the party of the first part in such amounts as may be designated from time to time by said party of the first part, fifty thousand yards cubic measure of good, clean, marketable gravel, such as shall be in the judgment of the superintendent of the said party of the first part suitable for ballasting the road-bed of said party of the first part, to be delivered on board cars and measured on the cars by the party appointed by said Missouri Pacific Railway Company to receive the same, the said gravel to be delivered within two years from this date, but the times and amount of delivery of gravel within such period to be determined by the party of the first part as it shall need the same from time to time. In consideration of the premises, the said party of the first part agrees to pay for said gravel forty-five cents per cubic yard, delivered on the cars as aforesaid, during the preceding month.

"In witness whereof the parties hereunto have set their hands this 5th day of October, 1892."

He alleged in his petition that he delivered 20,000 yards of gravel, such as was mentioned in the contract, to the defendant in car-load lots from time to time, and that in the fall of 1894 an agreement was made between them that the time for completion of the contract should be extended for one year from October 5, 1894, which would fix the time of its expiration on the 5th day of October, 1895; that he was at all times ready and willing to deliver the balance of the gravel mentioned in the contract, to

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wit, 30,000 cubic yards of the kind and quality described therein, and that the defendant had wrongfully refused to receive the same, to his damage in the sum of \$9,000, for which he prayed judgment. The answer of the defendant contained the following:

"Further answering this defendant says, that by the terms and conditions of said agreement so executed on October 5, 1892, it was agreed between the parties that the gravel to be delivered by the plaintiff to this defendant should be good, clean, marketable gravel, such as should be, in the judgment of the superintendent of this answering defendant, suitable for ballasting the road-bed of this defendant, and such like gravel was to be delivered at such times and in such amounts as should be designated by this defendant company, or its superintendent; that it took certain quantities of gravel delivered by said plaintiff, and paid for the same; that it was impossible to determine, without using the same, whether the gravel furnished by the plaintiff was suitable for ballasting the road-bed of the defendant company, and for that purpose a portion of such gravel was received, used and paid for, to the extent taken; that after using the same it became evident, and it was the judgment and opinion of the superintendent of this defendant company, that the gravel furnished by the plaintiff was not suitable for ballasting defendant's road-bed, and was not in accordance with the contract made between the parties, and said plaintiff was notified that the gravel furnished by him was not, in the judgment of defendant's superintendent, suitable for ballasting the road-bed of this defendant, and that no more of such gravel would be taken or used for such purpose. And the gravel so furnished by said plaintiff was, as a matter of fact, unfit and unsuitable for the purpose for which the same was contracted to be purchased, and said plaintiff was so informed, and the contract was terminated; that under the terms and conditions of said agreement the superintendent of defendant's company was made the sole judge as to the gravel being fit and suitable for the purpose of ballasting defendant's road-bed."

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The plaintiff for his reply denied the foregoing allegations of the answer, and alleged that the defendant received 21,816 yards of gravel, and used the same for ballasting its said road-bed, and made no complaint in regard to the same during the three years following October 5, 1892. Denied that it was the judgment and opinion of the superintendent of the defendant that the gravel furnished by the plaintiff was not suitable for ballasting defendant's road-bed, and was not in accordance with the contract made between the parties, and denied that plaintiff was notified that the gravel furnished by him was not, in the judgment of the defendant's superintendent, suitable for ballasting the road-bed of this defendant; and that no more of such gravel would be taken for that purpose; denied that the gravel so furnished by the said plaintiff was unfit and unsuitable for the purpose for which the same was contracted to be purchased, and alleged that it was suitable in the judgment of the superintendent of the defendant for ballasting defendant's road-bed; was the kind of gravel contracted for by said agreement. Denied each and every allegation in the second paragraph of the answer not admitted to be true, and alleged that the defendant received the said 21,816 cubic yards of gravel as stated in the petition, and used the same for the purpose for which it was delivered, viz., for ballasting defendant's road-bed; and that after the time for the delivery of the balance of the said gravel had expired, the defendant acting without reason, and arbitrarily in the premises, refused to receive the balance of the gravel contracted for by said agreement for the purpose of avoiding and escaping its liability under said contract.

Upon these issues the cause was tried to a jury, and a verdict was returned in favor of the defendant. A motion for a new trial was overruled; judgment was rendered on the verdict, and the plaintiff prosecutes error to this court.

1. The plaintiff's first contention is, that the verdict

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is not sustained by sufficient evidence; is contrary to the evidence and is clearly wrong. A careful reading of the bill of exceptions discloses that after the contract was entered into on the 5th of October, 1892, about 2,000 yards of gravel were delivered before plaintiff ceased work for the winter in the gravel pit. This gravel was used, not for ballasting purposes, but as a top dressing upon a portion of the road that had been ballasted with stone. During the summer of 1893, about 12,000 yards of gravel were delivered to the defendant, a portion of which was used for ballast on certain parts of its road-bed. It is shown beyond question that the 14,000 yards thus furnished by the plaintiff, and accepted by the defendant, came from the Springfield gravel pit, which had been inspected by the superintendent and road master of the defendant company, and was the gravel both parties had in contemplation at the time the contract was entered into. It conclusively appears that in 1894, the plaintiff leased the old abandoned Union Pacific gravel pit, which was some distance from the Springfield pit, of one Birkhauser, under an arrangement by which the gravel, if taken from that pit, would cost him only about one cent a cubic yard, whereas the gravel taken from the Springfield pit, which was the one in contemplation at the time the contract was entered into, would cost him twenty-five cents per cubic yard. In addition to this it cost about fifteen cents per cubic yard to load the same upon the cars. After having leased the Union Pacific pit the plaintiff furnished to the defendant, without its knowledge or consent, about 6,000 yards of gravel therefrom, instead of from the Springfield pit, and this fact might have had something to do with the question of the quality of the gravel furnished. It appears from the evidence of the superintendent of the defendant company, its road master and the engineer, that it had been experimenting with this gravel to ascertain whether or not it was suitable for ballast, and it was determined, as soon as practicable, which was in the spring of 1895, that it would not answer

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for that purpose at all. It appears that the gravel in question was round and smooth like beans; that it would not hold together, and would not hold the ties in place; that a person walking on it would sink into it the same as though he were walking on dry beans; that it worked out from under the ties, causing low joints, and it was impossible while using it to keep the track in line. It was shown that at one place where they had been experimenting with this gravel, and using it for ballast, an accident had occurred on account of its poor quality; that as soon as it was ascertained that the gravel was unsuitable, in the judgment of the superintendent, for ballasting purposes, notice was given to the plaintiff of that fact and the contract was thus terminated. This evidence is undisputed, and the fact of the unsuitableness of the gravel in question was shown by a large number of expert witnesses, men who had been engaged in railroading for many years with this company and with the Union Pacific Railway Company, and there was considerable evidence that wherever this gravel had been used upon the line of the Union Pacific it had to be removed and replaced by other ballast, because it was worthless for that purpose. The testimony was overwhelming that the gravel was, as a matter of fact, unsuitable for ballast; and this evidence was offered to rebut the claim made by the plaintiff that the defendant's superintendent had acted unreasonably and arbitrarily in arriving at his judgment as to the unsuitableness of the gravel for ballasting purposes. No evidence was introduced or offered by the plaintiff to show that the gravel was suitable for the purpose for which it was purchased, and the plaintiff admitted in his testimony that he had many conversations with the defendant's superintendent, in which they discussed the question, and remedies were suggested between them, and different modes of treating it with other material so as to render it suitable were discussed.

It further appears from the evidence that the plaintiff has since furnished gravel to the defendant, but not for

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ballasting; that defendant has never accepted or received any gravel on the contract in question, for that purpose, since it notified the plaintiff that the gravel was unsuitable for ballast in the judgment of its superintendent, and that it would not take any more of it under the contract. It thus appears that there was sufficient evidence to sustain the verdict, and in passing we might well remark that it seems to us that the preponderance of the evidence was with the defendant.

2. It is contended that the court erred in giving paragraph No. 2 of its charge to the jury. It appears that the court in instructing the jury in this case, in order to state the issues for them to determine, copied the pleadings, and in his second instruction, calling attention thereto, told the jury that the plaintiff was required to establish the material allegations of his petition by a preponderance of the evidence, and that the defendant was required to establish the material allegations set forth in his answer, which were denied by the reply, by a preponderance of the evidence. While this manner of instructing a jury ought not to be commended, yet under the circumstances in this case, we are unable to say that it was prejudicial to either the plaintiff or the defendant. Plaintiff cites no authority in his brief to sustain his contention, and we hold that the giving of this instruction was not reversible error.

3. The giving of instruction No. 3 is complained of, because it is claimed that the court did not properly define what was meant by a preponderance of the evidence. The instruction is as follows:

“By a preponderance of the evidence is meant greater weight of the evidence as viewed by you after a careful consideration of all of the evidence introduced in the case.”

This instruction is correct so far as it goes. It is not as full and explicit as it might have been, but the plaintiff's remedy was to tender such an instruction as he deemed proper. Where an instruction is not sufficiently

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explicit an objection to it will not be regarded unless the matter is brought to the attention of the trial court by a request for one that is satisfactory. Where it is claimed that instructions given to a jury were too general, and where a more explicit charge was not requested, the objection cannot be entertained. *The Burlington & M. R. Co. v. Schluntz*, 14 Neb., 421; *The Republican V. R. Co. v. Fellers*, 16 Neb., 169; *The Republican V. R. Co. v. Fink*, 18 Neb., 89; *The Sioux City, etc., R. Co. v. Brown*, 13 Neb., 317; *Carter White Lead Co. v. Kinlin*, 47 Neb., 409.

In the case of *Barr v. City of Omaha*, 42 Neb., 341, it was held that to make available an error in the giving of an instruction, that does not fully state the issues in the case, the parties complaining must properly request a full and complete instruction upon the point.

4. Plaintiff complains of the giving of instruction No. 5, and alleges that the court erred in injecting therein the issue as to whether or not, as a matter of fact, the gravel in question was suitable for ballast; and that the sole issue in the case was its suitability in the judgment of the defendant's superintendent. A careful examination of this instruction shows us that no such issue was injected into the case. It closes as follows: "Such as in the judgment of the superintendent would be fit for ballasting defendant's road-bed." But even if the court had injected this issue of fact into the case by this instruction, it would not have been erroneous, because that issue was tendered by defendant's answer, and was accepted by the plaintiff's reply, and was tried without objection. That matter was put directly in issue, and evidence was received on that question for the purpose of determining whether or not defendant's superintendent acted in an arbitrary, unreasonable and unjustifiable manner in finding that the gravel was not suitable for ballast.

5. Plaintiff complains of the giving of instruction No. 9, which is as follows: "You are the sole judges of the credibility of the witnesses, and of the weight to be given to their testimony." This instruction is discussed

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by the plaintiff in connection with instruction No. 3, which we have heretofore commented on. We are unable to see how instruction No. 3 in any manner affects the giving of instruction No. 9. This instruction is correct, as an abstract proposition of law, and was properly given. It is sufficient to say that the instructions taken together, while not as artistically drawn as they might have been, fairly presented the case to the jury, and we are unable to say that there was reversible error in this case in giving or refusing instructions.

6. Plaintiff alleges that the court erred in receiving and rejecting certain evidence. These assignments of error are too general, and under our rules we are not required to consider them. We have carefully examined the bill of exceptions and the record, however, and are unable to say that there was any prejudicial error in this respect.

7. The plaintiff contends that the judgment of the lower court should be reversed and a new trial granted on account of the alleged misconduct of one of the jurors. It is claimed that the juror Smith rode with the defendant's superintendent from Papillion to Omaha in his special car at the invitation of the attorneys for the defendant, and was entertained with refreshments on the way; and it is alleged that such action was improper and was prejudicial to the plaintiff. This matter was submitted to the court upon affidavits filed by both parties with the motion for a new trial, and the facts in relation thereto were determined by him upon the hearing of such motion. We are unable to say that the court erred in his judgment and finding in relation to that matter. It appears that the trial commenced on the 4th day of October at Papillion, Sarpy county, and continued until the evening of the 5th, when court adjourned until the following Monday morning, or the morning of the 8th of October. It appears from the affidavits and the evidence that the attorneys for the plaintiff, the juror and witnesses, together with the court and the reporter, were all anxious to get to Omaha as soon as possible; that it was at first

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supposed that there would be no train on the Union Pacific road which would stop at Papillion until sometime late in the night. The defendant's superintendent, who was a witness in the case, had a car upon the track which was used by him for his office and his place of abode during the trial; that upon the adjournment of court inquiry was made of him to ascertain if he was going to take his car to Omaha, and he replied that he was. Mr. Ransom, one of plaintiff's attorneys, was very ill at the time, and was unable to sit up, and a request was made of the superintendent to allow him, and such other persons as desired to go to Omaha, to ride in his car to that place. He replied that he was perfectly willing to take as many as he could accommodate; that upon such invitation the counsel for the plaintiff, counsel for the defendant and the juror Smith, took passage to Omaha in the superintendent's car. The court and his reporter also intended to go to Omaha in that manner, but while they were waiting to hitch an engine onto the car, a special freight train came along on the Union Pacific road which was stopped for an instant so that the court and his reporter, who were at the station, took passage thereon; that while on the way to Omaha supper was served in the car; that all of the persons therein partook of the same, except Mr. Ransom, who was too ill to eat anything. It was made to clearly appear that no one conversed with Smith in relation to the case, and that nothing was said about it from the time they entered the car until Smith left them in the suburbs of Omaha. These facts were known to the plaintiff's counsel from the time they occurred until the close of the trial, and yet no objection was made by them in regard to the matter. It was never brought to the attention of the court in any way until after the verdict, when it was first mentioned in the motion for a new trial. Counsel for the plaintiff, with full knowledge of all the facts, were content to retain Smith as a juror in the case and speculate upon his verdict. If they believed that the transaction complained

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of was prejudicial to the interests of their client they should have called the matter to the attention of the court at their first opportunity after its occurrence. Such action could then have been taken by the court as would have protected the interests of both parties to the suit. To remain silent was a breach of good faith on the part of counsel for the plaintiff, and after the coming in of the verdict they should not be permitted to complain of the result. When this matter was brought to the attention of the court by the motion for a new trial on the 11th of October, it was too late for plaintiff to avail himself of the objection, unless he could show by competent evidence, as a matter of fact, that the juror had become actually prejudiced in favor of the defendant; or that his mind was in such a condition that he was unable to render an impartial verdict in the case. No such showing was made. So far as appears from the record Smith was a competent juror, notwithstanding what may have occurred during the trial. The plaintiff by his conduct waived any objection to the transaction complained of, and the court did not err in overruling the motion for a new trial on that ground.

It is apparent from the record in this case that it was fairly tried, and the jury having determined the questions of fact and rendered their verdict thereon, it should be allowed to stand. We therefore recommend that the judgment of the district court be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

Opinion on rehearing follows.

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JOSEPH F. PARKINS V. THE MISSOURI PACIFIC RAILWAY
COMPANY.

FILED SEPTEMBER 17, 1903. No. 12,431.

Commissioner's opinion. Department No. 1.

1. **Trial: INSTRUCTIONS: PLEADINGS COPIED INTO: APPEAL AND ERROR.**
An abstract of pleadings, with a statement that it was incumbent on plaintiff to prove all his material allegations which were denied, is not prejudicial where the court by another instruction told the jury, preceding the statement by "that is," precisely what the points in controversy were.
2. **Contracts: BREACH: DAMAGES: EVIDENCE REQUIRED.** In an action to recover damages against a railroad company for refusing to carry out a contract to purchase gravel which was to be called for when wanted and to be in the judgment of the defendant's superintendent suitable for ballasting the road, where the making of any objection for unsuitability is denied, it is asking too much to require plaintiff both to prove an offer of gravel to which no objection on that ground was made during the life of the contract and also that the gravel was suitable.
3. **Trial: INSTRUCTIONS: ERROR IN ONE NOT CURED BY ANOTHER: APPEAL AND ERROR.** The fact that another instruction of different purport was given does not do away with the error of one which absolutely requires unnecessary proof to enable plaintiff to recover.

REHEARING of case reported *ante*, page 1.

ERROR from the district court for Sarpy county. Tried below before SLABAUGH, J. *Judgment below reversed.*

F. T. Ransom and Weaver & Giller, for plaintiff in error.

John F. Stout, James W. Orr and B. P. Waggener,
contra.

HASTINGS, C.

This case appears *ante*, page 1, and in 93 N. W. Rep., 197. Seven grounds for rehearing are set up in the motion. 1st. That the opinion proceeds on the ground that the contract was to furnish suitable ballasting,

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whereas it was merely to furnish such as should be suitable in the judgment of the defendant's superintendent. 2d. That the opinion is wrong in merely condemning the copying of the pleadings by way of statement of the issues and that it should have reversed the case because of it. 3d. Because the opinion finds that it would not have been error to submit to the jury an issue made without objection in both pleadings and proof, namely, whether or not the gravel was suitable. 4th. The saying that the assignments of error in the admission and rejection of testimony, 13 to 61 in the petition in error, are not specific enough, is wrong notwithstanding the opinion says they were examined, and we are not now asked to re-examine them. 5th. That the review of the evidence contained in the opinion mistakes the real issue, substantially a reiteration of the first ground. 6th. That the opinion is wrong in finding no prejudicial error in leaving to the jury the determination as to what the material allegations of the petition are. 7th. That the opinion is wrong in finding no prejudicial error in paragraph five of the trial court's instructions.

So far as the first point is concerned the trial court did not overlook the main issue. The former opinion says the issue as to the suitability of the gravel was not submitted, but there would have been no error in submitting it for it was made in the pleading and evidence introduced as to it. Defendant had pleaded a rejection of the gravel as unsuitable and alleged that it was so and this had been denied in the reply. The contract on which the plaintiff was suing was to supply gravel suitable in the judgment of defendant's superintendent for ballast on defendant's road. The court, by its instruction two, told the jury that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence all of the material allegations in his petition which are denied by the defendant's answer; that a like burden was upon the defendant as to all the material allegations of new matter in the answer which were denied; "that is," the court goes

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on, "the plaintiff must prove his readiness and willingness to furnish to the defendant under the terms of the contract the remainder of the 50,000 cubic yards of gravel not delivered. 2d. That the same was suitable for ballasting purposes in the judgment of defendant's superintendent. 3d. The defendant must prove that he objected and refused to take the gravel as and for the reason he alleges and so notified the plaintiff prior to October 5, 1895."

It is conceded that the time for the performance of this contract was extended to October 5, 1895, by mutual agreement. The defense to plaintiff's claim for loss of profits in furnishing this gravel to the defendant is that the gravel was not suitable for ballasting purposes in the judgment of the defendant's superintendent, and that plaintiff was so notified and that in fact it was not suitable. The trial court gave an extensive recital of the allegations of the petition, answer and reply, many of which are totally immaterial, but he summed up the whole in this instruction two so as to present distinctly and plainly to the jury the precise issue which the plaintiff says was overlooked. Doubtless it is error to tell a jury that a party must prove all his material allegations without also informing the jury what those allegations are. In this case it seems to have been done, however, with a brevity and plainness to which counsel did not suggest any improvement and would perhaps have difficulty in doing so now. It seems to us that the statement of the single issue in this case is so clearly and concisely made here that it is not possible that the extended recital of the pleadings can have done any serious harm. The second ground for rehearing should be overruled.

The third point, that the issue of whether or not the gravel was suitable, was submitted to the jury, will be considered in connection with the seventh one, the objection to instruction five.

With regard to the fourth point, counsel complain that the opinion remarks that their allegations of error in the

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admitting and the refusing of testimony, are not sufficiently specific. These allegations are that the court erred in permitting, or in refusing to allow the reading of answers to interrogatories specified by number in depositions and in permitting or rejecting answers to questions specifically numbered in the bill of exceptions, and still further identified by the page on which they occur. We do not ourselves perceive why these allegations are not specific enough if they in fact correspond with the numbering in the transcript. We have not taken the trouble to inquire whether they do or not. The court at the former hearing considered them and there is no complaint now that they were not correctly determined at the former hearing.

The complaint that the review of the evidence is solely with reference to a false issue, namely, the actual suitability of the gravel for ballasting purposes, seems to rest upon the fact that counsel now at least rest their case upon a claim that no objection to the gravel was made during the life of the contract. It is true that the former opinion seems to assume that there was a rejection for unsuitability, and that the real question here is as to whether or not the rejection was sufficiently well founded. The complaint as to the quality of this gravel was admittedly made after the delivery of more than 20,000 of the 50,000 cubic yards. The notice to plaintiff of any rejection of the gravel as unsuitable is expressly denied, but the record discloses evidence at least tending to show that an objection was made on that specific ground before the time for accepting or rejecting the gravel had gone by. The jury, as we have seen by instruction two, were explicitly told that in order to establish this defense, the defendant must show that the gravel was objected to on this ground before the expiration of the contract. Of course, while the contract was to furnish gravel suitable in the judgment of the defendant's superintendent for ballasting purposes, that judgment must have been an honest one, made with reference to the quality or the apparent quality of the gravel.

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The sixth complaint, that the second instruction given by the court on its own motion left the jury to ascertain for themselves what are the material allegations on either side, does not seem to us to be well founded. Doubtless the construction of the pleadings and the question as to what, in them, is material and what is not, is for the court. Doubtless it would be reversible error to tell the jury that all the material allegations of the party must be established and not inform the jury what those material allegations are, but the instruction is explicit in defining what those material allegations are. It told the jury with great definiteness what was incumbent on each party to be proved.

The seventh point, that paragraph five of the court's charge is erroneous and unintelligible, is more serious. This instruction was in the following terms:

"But if you believe from the evidence that the defendant did not prior to October 5, 1895, refuse to take any more gravel under the terms of the contract, because unsuitable, in the judgment of its superintendent, for ballasting purposes for its railway and that the ballast furnished under said contract was suitable for such purpose then you should find for the plaintiff, provided you find that and only to such an extent, not exceeding the amount of gravel undelivered under the contract, as plaintiff was ready, willing and able to deliver after the time the defendant claims he refused to take any more gravel and before the termination of such contract, to wit: October 4, 1895, such as in the judgment of the superintendent would be fit for ballasting defendant's road-bed."

It told the jury to find for plaintiff if there was no refusal of gravel prior to October 5, 1895, on the ground of unsuitability, and if in fact it was suitable for ballast. The rest of the instruction is not quite clear. It seems to have been intended to tell the jury what would be the measure of damages "provided you find that," *i. e.*, the lack of any refusal during the life of the contract and the suitability of the gravel. It seems to have been wrong

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in that it limited plaintiff's recovery to the amount within the terms of the contract which he was ready to furnish instead of a recovery only on condition of readiness to comply with the whole contract on his part. It was certainly wrong in failing to indicate whether the price of the undelivered gravel or the profits on it constituted the plaintiff's damages. Was it a fatal error for the court, in this instruction, to make the showing that plaintiff's gravel was suitable for ballast, an indispensable condition of recovery even though there had been no refusal? Plaintiff's contract was to furnish 50,000 cubic yards of gravel, when called for, before October 5, 1895. He was under no obligation to tender it. If he was ready to furnish it during all the time of this contract and its extension of the required quality, he would now be entitled to compensation. He says in his reply that he never had notice of any rejection of his gravel for lack of quality. He says in his testimony that he never learned of any complaint as to the quality of the gravel until the spring of 1896. It is true that Mr. Rathburn, the superintendent, says he had several conversations with plaintiff in the summer of 1895 in which he told the latter that the gravel would not answer for ballast. The witness Bush swears to hearing such a conversation, he thinks in June, certainly not later than July of that year. Mr. C. M. Clark swears that by Mr. Rathburn's order about July 24, 1895, he notified plaintiff that no more gravel would be received because it was unfit for ballast. These witnesses, however, are all in defendant's employment. The jury was not bound to take their statement against the unsupported one of plaintiff unless they found it easier to believe plaintiff was wrong than the three witnesses who contradicted him. It cannot be said that there is no evidence to go to a jury contradicting defendant's claim of a rejection of this gravel for lack of quality.

Defendant had accepted at various times during the two and one-half years before this alleged refusal about 12,000 yards of gravel from the Springfield pit and about 8,000

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yards from the Birkhauser pit, located about one quarter of a mile from the first. It would seem that the defendant would be estopped to claim any defect in this gravel unless plaintiff was notified of its refusal within the life of the contract. The trial court, however, in this instruction No. 5 required as a condition of the rendition of any verdict for plaintiff that he prove, not only that there was no refusal, but that his gravel was suitable for purposes of ballast. We are constrained to think that in requiring both the trial court asked too much. If there was a refusal, then proof that his gravel was clearly suitable for the required purpose, and the refusal arbitrary and unreasonable would have been necessary. In the absence of any rejection within the life of the contract such evidence could hardly be called for.

The final clause which is added to the instruction does not seem to aid it. As before stated, this part of the instruction seems only to refer to the measure of damages. So far as it is intelligible, it seems to say that the gravel which plaintiff was able and willing to deliver must be of as good quality as that which was accepted without objection and therefore was presumably suitable in the superintendent's judgment. Of course, there could be no other test if there was no rejection. But whatever meaning is understood of this last clause, the first part of the instruction distinctly told the jury to find for plaintiff when he proved there was no refusal and that his gravel was suitable for ballast. The requirement of both at once was prejudicial and it would seem sufficiently so to entitle plaintiff to a new trial.

It is recommended that the judgment of affirmance be vacated and the judgment of the district court reversed and the cause remanded.

AMES and OLDHAM, CC., concur.

JUDGMENT BELOW REVERSED.

Cummings v. Hart.

MATTIE W. CUMMINGS, APPELLEE, v. HATTIE M. HART ET
AL., APPELLANTS.

FILED JANUARY 8, 1903. No. 12,434.

Commissioner's opinion. Department No. 2.

Mortgages: FORECLOSURE: DEPOSIT BY PURCHASER. Order of the district court confirming a judicial sale examined and found regular.

APPEAL from the district court for Douglas county.
Tried below before FAWCETT, J. *Affirmed.*

W. A. Saunders, for appellants.

V. O. Strickler, contra.

OLDHAM, C.

This is an appeal from an order of confirmation of sale in a foreclosure proceeding.

The only error complained of in the brief of appellant is the existence of rule No. 24 of the district court of Douglas county, which requires every purchaser at sheriff's or master's sale, at the time the property is bought in by him, to deposit with the sheriff or master \$50 as a guarantee of good faith. We expressed our opinion of the reasonableness of this rule in the recent case of *Green v. Diezel*, 3 Neb. [Unof.], 818, and adhere to what we said in that case.

It is therefore recommended that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

Village of Atkinson v. Fisher.

THE VILLAGE OF ATKINSON V. EDWARD F. FISHER.

FILED JANUARY 8, 1903. No. 12,436.

Commissioner's opinion. Department No. 2.

1. **Municipal Corporations: STREETS DEFECTIVE: REPAIRS.** *City of Lincoln v. Calvert*, 39 Neb., 305, followed.
2. **Municipal Corporations: STREETS: PERSONAL INJURIES: DILIGENCE TO AVOID.** All persons traveling along streets must use ordinary care to avoid injury at all times; circumstances may bear upon the question whether there was ordinary care in a particular case, but they do not change the rule.
3. **Municipal Corporations: PERSONAL INJURIES: DAMAGES: DILIGENCE: NEGLIGENCE.** A plaintiff injured by the negligence of another cannot recover for damages which he might have avoided by the use of reasonable and ordinary diligence in seeking to effect a cure; but if his course was not unreasonable in view of his age and circumstances and the nature of the original injury, a recovery will not be defeated.

ERROR from the district court for Holt county. Tried below before HARRINGTON, J. *Affirmed.*

R. R. Dickson, for plaintiff in error.

Norris Brown and *W. E. Scott*, *contra.*

POUND, C.

The principal questions of law presented relate to certain instructions as to the duty of the village toward those using its streets while improvements were in progress. One of these instructions is in the very words of this court in *City of Lincoln v. Calvert*, 39 Neb., 305, and the others, taken together, are entirely consistent with that decision. While extracts from these instructions may make them appear somewhat unfavorable to the village, when they are read as a whole and taken in connection with each other, we think them more than ordinarily careful and well prepared. The refusal of certain instructions is also complained of. Two of these instructions were to the

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effect that it was incumbent on the plaintiff to use greater care on a dark, wet night at a late hour than when traveling along the street in the daytime. Although an intelligent jury scarcely needed the information, it would have been proper to tell the jury that the condition of the weather and the time of the night were circumstances to consider in determining whether the plaintiff exercised due care. But the degree of care required as a matter of law was not changed. All persons traveling along the streets must use ordinary care to avoid injury at all times. In *Village of Culbertson v. Holliday*, 50 Neb., 229, this court remarked that the law does not require of an old person greater care to avoid injury than it requires of one who is young and vigorous; it requires ordinary care of each. The same is true as to any other circumstance. Circumstances may affect the question whether ordinary care has been used on a particular occasion, and this may be stated to the jury, but they operate as a rule, no further. The defendant did not ask such an instruction. The law as to contributory negligence had been stated, and that issue was fairly submitted. We perceive no error. The other instructions refused, set forth in substance that negligence on the part of the village was not to be presumed and that it was presumed that the municipal authorities were prosecuting their work in a safe and proper manner. The court had already instructed the jury that the burden was upon the plaintiff to show negligence on the part of the defendant. This covered the point sufficiently.

It is argued that the verdict is wrong under the evidence because the accident was due to removal of a lantern and disturbance of certain guard-rails by a third person without notice to the village, and also that the damages are excessive because plaintiff did not take proper care of himself nor conform to the advice of his physician. There is no competent evidence that a third person interfered with the lantern or guard-rails. One witness testified that "it was said" such was the fact. The jury were justified in

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finding that the excavation, which was on a frequented street and obviously very dangerous, was not adequately guarded within the rule laid down in *City of Lincoln v. Calvert, supra*. As to the damages, it appears that the plaintiff's knee is disabled by certain "floating cartilages," which are painful and have a tendency to lock the joint. His leg has also decreased in size somewhat from lack of use. The latter difficulty could have been prevented by exercise; and it may be that more persistent following out of a suggestion of his physician could have obviated the former. Undoubtedly negligence of the person injured, in such a case, may be taken into account in determining the damages; and he cannot recover for damages which he might have avoided by the use of reasonable and ordinary diligence in seeking to effect a cure. *City of Crete v. Childs*, 11 Neb., 252; *Allender v. Chicago, R. I. & P. R. Co.*, 37 Ia., 264; *The City of Goshen v. England*, 119 Ind., 368, 21 N. E. Rep., 977; *Citizens' Street R. Co. v. Hobbs*, 15 Ind. App., 610, 43 N. E. Rep., 679; *Strudgeon v. Village of Sand Beach*, 107 Mich., 496, 65 N. W. Rep., 616. But ordinary care only is required. *The Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind., 409, 3 N. E. Rep., 389. And considering the plaintiff's age and circumstances and the nature of the original injury, we do not think his course was such as to bar a recovery. No instruction on this point was requested by the village. Moreover we have no reason to think a different verdict could have resulted had such an instruction been submitted. It appears in evidence that the floating cartilages are the result of inflammation caused by the injury. Until taken out, they permanently disable the limb, and a somewhat difficult and expensive surgical operation would be required to remove them. In view of these facts, the damages (\$900) are not at all excessive.

We recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

Whelen v. Stilwell.

HENRY WHELEN ET AL., APPELLEES, v. KATIE STILWELL,
APPELLEE, IMPEADED WITH HENRY AMBLER ET AL.,
APPELLANTS.

FILED JANUARY 8, 1903. No. 12,440.

Commissioner's opinion. Department No. 2.

1. **Taxation: FORECLOSURE: CERTIFICATES OF LIENS: REQUISITES.** Under the statute requiring an officer to certify liens to the sheriff, on property about to be sold at judicial sale, it is sufficient if the general character of such liens be stated in the certificates. *Orcutt v. Polesley*, 59 Neb., 575.
2. **Taxation: FORECLOSURE: DEPOSIT BY PURCHASER.** Rule No. 24 of the district court for Douglas county, which requires bidders at judicial sales to deposit \$50 with the sheriff as evidence of their good faith, is a reasonable one. *Green v. Diezel*, 3 Neb. [Unof.], 818, and *Cummings v. Hart*, ante, page 20, approved and followed.

APPEAL from the district court for Douglas county.
Tried below before DICKINSON, J. *Affirmed.*

W. A. Saunders, for appellants.

V. O. Strickler, contra.

BARNES, C.

This is an appeal from an order of the district court for Douglas county, confirming a sale of real estate, made under a decree of that court foreclosing certain tax liens on a number of lots situated in outlying additions to the city of Omaha. But two objections are made to the order appealed from. The first is, that the certificate of the city treasurer is invalid, and therefore the sheriff had no authority to deduct the taxes mentioned therein from the appraised value of the property. An examination of the record shows us that great care was exercised in certifying the liens and making the appraisements. Each lot mentioned in the decree was appraised separately; the value thereof was placed opposite the description, and then followed the amount of taxes, which were certified to be legal liens thereon by the city and county treasur-

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ers. So far as the certificate is concerned, it appears to be sufficient. That matter was before this court in the case of *Orcutt v. Polsley*, 59 Neb., 575, where it was held that under a statute, requiring an officer to certify to the character of such liens, it is sufficient if their general character be stated in his certificate. It was also held that where an officer was not required by law to have an official seal a certificate made under his hand, as such officer, was sufficient. This objection is, therefore, without merit, and was properly overruled.

The second objection is, that the district court had no power or authority to place any restriction upon bidders in the way of requiring them to make a deposit of \$50 to make good their bid. This requirement is a rule of the district court for Douglas county, and has been passed upon by us in two other cases. In the case of *Green v. Diezel*, 3 Neb. [Unof.], 818, Commissioner OLDHAM, writing the opinion, held that this rule requiring purchasers at a sheriff's or master's sale to deposit \$50 with the sheriff or master, as a guaranty of good faith in their purchase, was a reasonable one. That case was followed and approved in *Cummings v. Hart*, ante, page 20.

It appearing that there is no merit in the objections of the appellant to the order of the confirmation herein, it is recommended that such order be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

W. P. FERGUS, APPELLANT, v. CHARLES GAGNON, APPELLEE.

FILED JANUARY 8, 1903. No. 12,444.

Commissioner's opinion. Department No. 2.

1. Replevin: PLEADING: AFFIDAVIT. In an action of replevin before a justice of the peace the affidavit is the only pleading required.
2. Replevin: AFFIDAVIT: ALLEGATION OF VALUE. An affidavit in replevin before a justice of the peace need not allege the value of the property replevied.

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3. Replevin: PROPERTY NOT SURRENDERED: PROCEDURE: DAMAGES.

When the return of the officer to a writ of replevin shows that the summons and writ were served on the defendant, and that the property could not be taken on account of the resistance of the defendant, the action may proceed as an action in damages for the value of the property wrongfully detained.

4. Judgment: MISTAKE IN RENDERING: COLLATERAL ATTACK. Where a court has power to grant the relief sought in a proper case, a mistake in doing so, in an improper but similar case, will not render the entire proceedings void and subject the judgment to a collateral attack.

APPEAL from the district court for Richardson county.
Tried below before STULL, J. *Affirmed.*

Reavis & Reavis, for appellant.

Clarence Gillespie and Edwin Falloon, contra.

OLDHAM, C.

In 1894, plaintiff in this cause of action was acting in the official capacity of sheriff of Richardson county, Nebraska. While so acting, he levied a writ of replevin issued by the county court of Richardson county in the case of Francis Dupias against Cornelia Quarnel, then pending in said court on two horses alleged to have been the property of Dupias. After he had taken these horses in custody under this writ an action of replevin was instituted by defendant Charles Gagnon against the plaintiff before a justice of the peace of Richardson county for the possession of the horses which the sheriff then had in his custody. A summons in replevin was issued in this latter case and served upon plaintiff by a constable of said county. The sheriff forcibly resisted the attempt of the constable to take possession of the property and the constable thereupon made the following return:

"January 3, 1894, summons and replevin returned indorsed December 30, 1893. I received this writ and on the same day I called upon the defendant and found the property described herein in his possession and tried to take

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the same under this writ, the defendant refused to give property and being physically overpowered by this defendant, I was unable to take the property from him. I was unable after that to find said property within Richardson county. On said 30th day of December, 1893, I served upon said defendant a true and certified copy of said writ together with all the indorsements thereon. All done in Richardson county, Nebraska. George E. Taylor, constable."

At the time set for trial the sheriff failed to appear and on his default being properly noted on the docket the justice of the peace proceeded to the trial of the case as an action for damages and entered a judgment which is regular on its face against the plaintiff in this case for the sum of \$135 and costs of the action. A transcript of this judgment was subsequently filed in the district court of Richardson county. Plaintiff thereupon instituted this cause of action in the nature of a bill in equity setting forth that the court had entered the judgment without any jurisdiction; also alleging that the judgment was entered by a fraudulent conspiracy between the plaintiff and the justice of the peace rendering the judgment, and asking that the judgment be canceled and that the defendant be permanently enjoined from having any execution issued upon said judgment. The material allegations of the petition were denied by the defendant and on issues thus joined the trial court found for the defendant and dismissed plaintiff's bill and plaintiff brings the action here by appeal.

There is no testimony tending to show any actual fraud or conspiracy between defendant Gagnon and the justice of the peace in procuring this judgment, so that the question to be determined is whether or not this judgment is absolutely void and was rendered by a court having no jurisdiction of the subject-matter of the controversy. For unless this be true, no matter how erroneous the conduct of the case may have been the judgment would not be obnoxious to a collateral attack. *Toogood v. Russell*, 3 Neb. [Unof.], 189, 91 N. W. Rep., 249.

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The affidavit on which the writ of replevin was issued was in the usual form and alleged that the plaintiff was the owner of the property, describing it, and entitled to the immediate possession of the same; that "the said property is wrongfully detained by one W. P. Fergus, sheriff of Richardson county," and contained all the other formal allegations in an affidavit for replevin, but did not allege the value of the property sued for.

This was the only pleading filed before the magistrate and the first question to be determined is, does this constitute a sufficient statement of a cause of action to support the judgment rendered? It has been frequently held by this court that an affidavit in replevin is the only pleading necessary in an action of that nature tried before a justice of the peace. *Bolin v. Fines*, 51 Neb., 650, 71-N. W. Rep., 293, and cases cited. And likewise that it is not essential that the affidavit state the value of the property replevied. *Hill v. Wilkinson*, 25 Neb., 103.

Another objection urged to the judgment is that the return of the constable, above set out, did not show that the property could not be found in Richardson county, but on the contrary showed that it had been found, but was not returned under the writ and that this return ousted the justice of jurisdiction of the subject-matter of the controversy. We cannot agree with this conclusion in view of the provisions of section 1043 of the Code of Civil Procedure, which says:

"When the property claimed has not been taken, or has been returned to the defendant, for want of the undertaking required by section one thousand and thirty-nine, the action may proceed as one for damages only."

We do not believe that the defendant in an action of replevin can oust the court authorized to issue the writ from its jurisdiction by holding the property with a strong hand and threatening the officer armed with the writ from executing the same by threats of personal violence, as the evidence tends to show was done in the case at bar. The section of the statute just quoted permits the action to

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proceed as one for damages whenever the officer shows by his return that he has been unable to procure possession of the property replevied, no matter what the obstacle to procure such possession may have been.

It is finally contended that the property against which the writ of replevin was issued was *in custodia legis* and while so was not the subject of a cross-replevin at the suit of a stranger to the first action.

While we are conscious of the fact that there is a great conflict of authority on this question, we are inclined to the view that such is the rule established in this state by the recent decision in *Yost v. Schleicher*, 62 Neb., 601, and without positively deciding this question, we shall for the purpose of the argument concede that this is the rule. Presuming then that the property was *in custodia legis* and not subject to an action of cross-replevin, does this fact render the judgment of the justice of the peace void or voidable only? In the first place the justice of the peace had jurisdiction in all actions of replevin where the value of the property does not exceed \$200, especially conferred upon him by statute, and even where his jurisdiction is exercised in an action of replevin for property exceeding this value he retains sufficient control of the suit to certify the action to the district court of his county. *Hill v. Wilkinson, supra*. We are then confronted with the determination of the validity of a judgment, as against a collateral attack, where the court has power to grant the relief prayed for in a proper case, but where such jurisdiction has been exercised over exempt property or persons by overlooking a law which established their exemption. The rule in this class of cases is tersely stated in *Van Fleet, Collateral Attack*, section 214:

“When the tribunal has power to grant the relief sought in a specified class of cases, the granting of that relief in a prohibited case which is similar to the specified cases, or belongs to the same general class, is not void. The prohibition may be in another statute, or be obscure and difficult to find; and on principle, the failure to find an

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obscure exception should no more make a proceeding void than a misconstruction of an obscure law. But the principle is broader than this. It is not confined to mere excepted cases. For instance, if the court has power to render a judgment for money on causes sounding in contract only, its judgment for money is not void because the cause sounded in tort. That is a matter of defense to be brought to the attention of the court. The same principle applies where the law prohibits certain persons from suing or being sued in that court. As the court has power to grant the relief sought in all proper cases, the granting of the same to or against an improper person, is merely a wrongful exercise of power and not usurpation."

The question then in this case is not whether the court actually had jurisdiction over the property in suit, but whether jurisdiction was one of the questions that it was necessary for the court to determine in disposing of the cause. *Werz v. Werz*, 11 Mo. App., 26. If it was, then this matter should have been brought to the attention of the court by answer or plea.

We cannot concede that there was sufficient information communicated to the justice of the peace in the affidavit for replevin filed with him which described the defendant in that case as "W. P. Fergus, sheriff of Richardson county, Neb.," to show him that the property was *in custodia legis* at the time the writ was issued. The affidavit did not bring the fact to the notice of the magistrate that the sheriff of Richardson county was holding the property replevied under a valid levy of a writ of replevin issued from the county court of said county, and unless the sheriff did not hold the property under a valid process the property would not have been *in custodia legis*. *Schurs v. Barnd*, 27 Neb., 94; *Cooley v. Davis*, 34 Ia., 128; *Wood v. Orser*, 25 N. Y., 348. We therefore conclude that as the court had power to grant the relief sought in a proper case, its mistake in doing so in an improper but similar case ought not to render its entire proceedings void and subject to collateral attack.

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It is therefore recommended that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

THOMAS MURRAY, APPELLANT, v. ROLANDUS ROMINE,
APPELLEE.

FILED JANUARY 8, 1903. No. 12,445.

Commissioner's opinion. Department No. 3.

Mortgages: FORECLOSURE: APPRAISAL: OBJECTIONS, TIME FOR.

APPEAL from the district court for Douglas county.
Tried below before FAWCETT, J. *Affirmed.*

I. J. Dunn, for appellant.

B. F. Thomas, contra.

DUFFIE, C.

This is an appeal from an order confirming a sale. The objections which go to the appraisement made, were not filed until after the sale. We have uniformly held that objections to an appraisement must be made and filed before the sale takes place, otherwise any informality or illegality in the appraisement will be deemed waived.

We recommend the affirmance of the order appealed from.

AMES and ALBERT, CC., concur.

AFFIRMED.

Estate of Barr v. Post.

THE ESTATE OF WILLIAM BARR, DECEASED, v. MARTHA A. POST.

FILED JANUARY 8, 1903. No. 12,446.

• Commissioner's opinion. Department No. 3.

Injunction: ANCILLARY PROCEEDINGS: FEES OF COUNSEL AS DAMAGES.

A recovery of counsel fees for the trial of a case will not be allowed as an element of damages for an injunction wrongfully obtained if the injunction proceedings be only ancillary to the main case.

ERROR from the district court for Lancaster county. Tried below before HOLMES, J. *Reversed and dismissed.*

W. M. Morning and G. W. Berge, for plaintiff in error.

Stewart & Munger, contra.

DUFFIE, C.

Martha A. Post recovered judgment against William Barr, now deceased, in the sum of \$2,000, which was afterwards affirmed in this court. Barr thereafter brought a suit in equity in the district court of Lancaster county to obtain a new trial, alleging that the judgment against him was obtained by false and perjured testimony on the part of Mrs. Post, which fact he had discovered since the trial of the case. He also obtained an order restraining Mrs. Post from enforcing her judgment while said equity suit was pending and until it was determined whether he would obtain a new trial. The restraining order remained in force until the final trial of the case upon its merits, no action being taken to dissolve the same. On the final trial of the equity case the court found against Barr and dismissed his petition, and thereupon an action was brought upon the bond given by Barr at the time of obtaining the restraining order. The only element of damages claimed by plaintiff is attorney fees, and the only question to be determined is whether attorney fees are re-

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coverable in a suit upon a bond where the restraining order or injunction is merely ancillary to the main action.

In Cunningham v. Finck, 63 Neb., 189, 88 N. W. Rep., 168, it was held that "a recovery of counsel fees for the trial of a case will not be allowed as an element of damages for an injunction wrongfully obtained, if the injunction proceedings be only ancillary to the main case."

To the same effect is the holding in *First National Bank of Harvard v. Hockett*, 2 Neb. [Unof.], 512, 89 N. W. Rep., 412.

These cases, we think, fully dispose of the only question raised, and we recommend that the judgment appealed from be reversed and the action dismissed.

AMES and ALBERT, CC., concur.

REVERSED AND DISMISSED.

THE VILLAGE OF HOLSTEIN ET AL. V. KATIE KLEIN.

FILED JANUARY 8, 1903. No. 12,448.

Commissioner's opinion. Department No. 2.

Appeal and Error: EXCEPTIONS, BILL OF: AUTHENTICATION. A document accompanying a transcript will be disregarded unless authenticated by the certificate of the clerk of the district court.

ERROR from the district court for Adams county. Tried below before ADAMS, J. *Affirmed.*

M. A. Hartigan, for plaintiffs in error.

John C. Stevens, contra.

POUND, C.

The errors assigned in the petition in error and argued in the briefs are not reviewable for the reason that no properly authenticated bill of exceptions is before us. There is

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a document attached to the transcript which was doubtless intended to serve that purpose, but there is no certificate of the clerk as to its nature or authenticity. A document accompanying a transcript will be disregarded unless authenticated by the certificate of the clerk of the district court. *Chicago, R. I. & P. R. Co. v. Ringo*, 52 Neb., 163. The pleadings are sufficient to sustain the judgment and the instructions are correct as abstract propositions. We therefore recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

MARY SILK, APPELLANT, v. JOHN McDONALD, SHERIFF OF DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLEES.

FILED JANUARY 8, 1903. No. 12,450.

Commissioner's opinion. Department No. 3.

Ejectment: ADVERSE POSSESSION: PARTIES: HUSBAND AND WIFE: HOMESTEAD. A judgment in an action in ejectment, in favor of one holding the paper title to real estate, against one claiming by adverse possession, is not binding on the wife of the latter, if not a party thereto, in a subsequent action brought by her to protect her homestead rights in such premises, where it appears that the adverse possession had ripened into a title in fee before the action against her husband was brought.

APPEAL from the district court for Douglas county. Tried below before ESTELLE, J. *Reversed with directions.*

J. J. O'Connor, for appellant.

John N. Baldwin and Edson Rich, contra.

ALBERT, C.

On the 14th day of December, 1898, the Union Pacific Railroad Company brought an action in ejectment against James Silk, the husband of the plaintiff in this case, to recover possession of certain property, in the city of

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Omaha, which resulted in a judgment in favor of the plaintiff in that action. Afterward, and before the commencement of the present action, a writ of restitution was issued on the judgment in ejectment, and was delivered to the sheriff for service, who, at the time of the commencement of this action, was intending to evict the plaintiff and her family under such writ. On the 2d day of November, 1899, the plaintiff brought this action against the sheriff, to restrain such eviction. A trial was had to the court, which resulted in a finding and decree for the defendant. The plaintiff brings the case here on appeal.

It is conclusively established by the evidence, that the plaintiff and her family, consisting of her husband and some nine children, had occupied the premises in controversy for more than seventeen years before the commencement of this action, and for more than sixteen years before the commencement of the action in ejectment, as their homestead, and that during all that time their occupancy had been open, notorious, exclusive and adverse and under a claim of ownership. The theory of the defense is best shown by a quotation from the printed argument of the defendant, which is as follows:

"The homestead right cannot exist without some title to which it is attached or out of which it grows. In the case at bar there was no right even of occupancy or possession, the appellant and her husband being mere squatters or trespassers. * * *

"As determined in the ejectment suit against James Silk, he had no legal title or right of possession at all, and hence no homestead right could attach.

"An examination of the record discloses that while James Silk was sometimes absent from home, he was living at home at the time his wife claims to have purchased the house into which the family moved and that said residence was at all times his domicile and was such at the time of the trial of the suit at bar. Being the head of the family, his domicile was his wife's domicile, and his possession was his wife's possession, she being

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in privity with him. The district court in the case of Union Pacific Railroad Company against James Silk (the ejectment suit), found in effect in June, 1899, that James Silk had not occupied the premises ten years, and that he had no title in and to the premises as against the Union Pacific Railroad Company. For this reason no homestead right could attach. A squatter who has occupied property less than ten years has no greater title at the end of nine years than he had at the end of one year, or one month, and must occupy the premises the full ten years before any title vests upon which the homestead right could be predicated."

In our opinion, the argument just quoted is unsound. It may be conceded, that when the possession is by a family, such possession is that of the husband, and whatever interrupts the running of the statute as to him, interrupts it as to all. But when the statute has run and the naked possession has ripened into a title in fee simple, the homestead right, claimed therein, is to be determined by precisely the same rules as though title had been acquired by a formal conveyance. As before stated, the evidence is conclusive that the possession of the premises, by the plaintiff's family, had ripened into a title in fee simple before the commencement of the action in ejectment. Whether that title vested in the plaintiff, or her husband, is wholly immaterial, in this case. If in the husband, the instant such title vested, if not before, the homestead right of the plaintiff attached as effectually as though the husband had acquired title by deed. Such right was a vested right, and could be divested by no act of her husband in which she did not join. *Morrill v. Skinner*, 57 Neb., 164. That one can not be divested of a vested right, by a judgment rendered in an action to which he is not a party, is fundamental. The fact that the judgment in ejectment involves a finding that the husband had not acquired title by adverse possession, no more concludes the plaintiff in this case, than would a finding that the conveyance, under which he claimed, was a forgery,

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had he claimed title by deed. In either case, the issue is one on which she has a right to be heard in her own behalf, and in defense of her own rights. For the determination of those rights, the judgment in ejectment against her husband is wholly immaterial. To hold otherwise, would amount to a nullification of section 4, chapter 36, Compiled Statutes, which provides that the homestead of a married person can not be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife, because it would leave it within the power of the husband, at any time, to suffer judgment to be taken against himself for the purpose of divesting the wife's right of homestead.

The title to the property and its homestead character, the only controverted questions in the case, having been conclusively established, it follows that the decree of the district court is erroneous.

It is recommended that the decree of the district court be reversed and the cause remanded with directions to enter a decree, as prayed, in favor of the plaintiff.

AMES and DUFFIE, CC., concur.

The decree of the district court is reversed and the cause remanded with directions to enter a decree as prayed, in favor of the plaintiff.

REVERSED WITH DIRECTIONS.

AGNES HARMON, APPELLANT, v. JARVIS S. CHURCH ET AL.,
APPELLEES.

FILED JANUARY 8, 1903. No. 12,452.

Commissioner's opinion. Department No. 1.

Telegraphs and Telephones: STOCK: OWNERSHIP: EVIDENCE: SUFFICIENT. Evidence examined, and *held* to support the decree of the district court; the only question being as to the ownership of certain shares of stock.

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APPEAL from the district court for Nemaha county. Tried below before STULL, J. *Affirmed.*

J. S. McCarty and H. A. Lambert, for appellant.

W. H. Kelligar, E. Ferneau and E. B. Quackenbush, contra.

HASTINGS, C.

Plaintiff brought suit in the district court for Nemaha county alleging that she was the wife of G. W. Harmon; that the defendant Cole, is the sheriff of the county; that she was and had been from the organization of the company the owner and in possession of forty shares of the Auburn Telephone Construction Company's stock, and that her husband had no interest in it; that Cole by the instructions and request of the defendant Church, made a pretended levy of two executions in favor of the defendant Church, and against plaintiff's husband upon her stock and had advertised fifteen shares for sale; that the shares were in plaintiff's possession and in her name on the books of the company, but defendant threatened to sell them, and unless restrained would do so; that about December 1, 1900, without plaintiff's authority, her said stock was issued by said telephone company to G. W. Harmon and placed in his name, but that as soon as she became aware of this, and before said levy, the stock was transferred on the books of the company to the plaintiff; that the sale of the stock under such levy would cast a cloud on plaintiff's title, cause her irrevocable injury and multiplicity of suits.

Defendant answered saying that the petition did not state facts sufficient to entitle her to an injunction; admitted the official character of defendant Cole, and the levy; denied plaintiff's ownership of the stock; admitted the advertisement for sale of the stock; denied the possession of the stock by plaintiff; sets out a recovery of a judgment of \$277, September 5, 1899, and another of \$157.85,

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August 8, 1899, both in the county court of Nemaha county, and both of which are alleged to have been filed by transcript in the district court of that county. Defendants ask that plaintiff's petition be dismissed; that their executions be declared a valid lien upon the stock and that plaintiff be directed to surrender it to the sheriff and the latter to sell it in satisfaction of the executions.

Plaintiff's reply admits the judgment against her husband; says that the indebtedness on the first was contracted and the credit extended to him more than five years before the telephone stock was issued to her, and that the indebtedness on the second was incurred more than four years before the issuance of the telephone stock and none of it on any credit obtained by reason of said stock.

The court found for the defendants and dissolved the injunction. Motion for new trial was overruled and decree entered requiring plaintiff to surrender the stock levied upon to the sheriff, and the latter to sell it in satisfaction of the executions. From this decree plaintiff appeals.

The only question argued at the hearing was the ownership of the stock in controversy. It was claimed on behalf of the defendants that the evidence of ownership of the stock was conflicting; that it had been passed upon by the trial court and that its decision upon such conflicting evidence is conclusive.

The contention of appellant is summarized by her counsel as follows:

"1. That G. W. Harmon had a right to use his salary whether it was exempt or not, in the purchase of a homestead.

"2. That he had the right to convey that homestead or have it conveyed to his wife, and she would become the owner thereof and no creditor would have a right to complain.

"3. That when she became the owner of the homestead, she had a right to mortgage the same to raise money to

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invest in the telephone enterprise without subjecting the same to her husband's debts, and the profits thereof would belong to her.

"4. That she had a right to employ her husband as her agent in looking after her investment in the telephone corporation and that his acting in such capacity did not make her property liable for his debts."

None of these propositions are disputed by the appellees. They say that the only way the homestead matter comes into this case is because the money to purchase the stock was raised by a mortgage on the homestead and because the homestead stood in her name, the stock became hers. They say the facts connected with the purchase and ownership are all undisputed. They might have added that in the same sense all the facts are undisputed in regard to the purchase of the stock and the entire case. That is to say, no statement of any witness is denied by any other. The only thing in question is the ultimate fact of ownership to be deduced from these facts.

In April, 1895, G. W. Harmon was appointed postmaster at Auburn. In May he bought for \$1,250 a residence in that city. On this he paid either \$350 or \$500, apparently the first named sum, borrowed from his father-in-law, and gave notes in three annual payments for the rest of the price. These notes he paid from his salary as postmaster. After they were paid, the money from his father-in-law was repaid from the same source, and the premises which had been conveyed to his father-in-law were deeded to the plaintiff. This was in July, 1899. July 13 the Telephone Construction Company seems to have been organized. G. W. Harmon's name appears as one of the incorporators. He appears to have then represented thirty shares. This would be equivalent to sixty as they were finally issued. The capitalization, in view of the earnings and value of the plant and franchise, was doubled when the issuance of shares took place. He says that ten of these were taken for a nephew and twenty of them for his wife; that he himself had nothing in it; that ten per cent. of the face

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value of these shares had then to be advanced and the nephew paid it. Articles of incorporation were adopted providing that no one who was not a stockholder should be an officer and G. W. Harmon was elected a director and secretary. He says that in August his wife borrowed the \$500 on the residence property and that was paid by a check, which was deposited to her credit and checked out in payment for the shares, apparently by himself, as he claims, on her behalf.

No stock was issued till November 23 and no knowledge on the part of the other incorporators except the treasurer, Kerns, that G. W. Harmon did not claim to own this stock, appears. The latter swears, and Kearns corroborates him, that before this they had talked of the propriety of Harmon's acting as secretary while his wife owned the stock. Both say that the understanding between them was that the wife owned it. The treasurer's son made out the certificates and made them to the husband. The latter says he called the treasurer's attention to it and the latter said, "Well, they can be transferred." This was not done, and in a few days proceedings in aid of execution were commenced against Harmon and seem to have been dismissed on December 10. On the same day, Mrs. Harmon presented her certificates at the company's office and her husband transferred them on the books of the company, and a little later on the same afternoon the executions were levied. Mrs. Harmon says she had possession of the certificates from the day of their issue. Both the assignment and the transfer of the shares on the books are dated December 10. The president of the company says he understood the shares were issued to G. W. Harmon. One of the notes on which the judgments were founded bore date of 1894 and one of 1895. The first seems to have been a partnership debt of the husband and the second to have been a note signed by him as surety.

The question is whether these facts show enough ownership of this stock to uphold the trial court's finding and decree that the husband's creditors are entitled to a satis-

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faction of these judgments out of it. The facts, so far as they tend to show ownership in the husband, are that his earnings bought the homestead; that it was put in the wife's name, that he negotiated, as both of them swear, by her authority, the loan of \$500 which bought the stock. That he was one of the incorporators of the company acting in his own name; that he assisted in adopting the by-law that required officers to be also stockholders; that he was elected and served as secretary; that as such secretary he signed the stock certificate issued to himself on November 23 or 24. That at that time, or shortly afterwards, there were proceedings in aid of execution commenced on the judgments; that nothing was done towards a transfer of this stock until these proceedings were dismissed on December 10, and then the transfer was made a little before the levy on the same day.

We are of the opinion that there was enough in these circumstances to warrant the conclusion of the district court, that this money was raised on the homestead and restored to the husband's possession, from which it originally came, with intention that he should have the control and ownership of it. At all events we are not able to say that such conclusion is clearly wrong notwithstanding the statements of both husband and wife that such was not the case.

It is recommended that the decree of the district court be affirmed.

KIRKPATRICK and LOBINGIER, CC., concur

AFFIRMED.

Ebel v. Stringer.

CHARLES W. EBEL, APPELLEE, v. EDWARD STRINGER ET AL.,
APPELLEES, IMPLEADED WITH THE SOMERSET TRUST
COMPANY, APPELLANT.

FILED JANUARY 8, 1903. No. 12,461.

Commissioner's opinion. Department No. 2.

Supersedas: LIENS AND LIMITATION OF ACTIONS, SUSPENSION OF: APPEAL AND ERROR: MORTGAGES. The filing and approval of a supersedeas bond in an error proceeding from a judgment of the district court suspends the lien of the judgment, which is a mere incident thereto; and the running of the statute of limitations against the lien of such judgment is suspended during the pendency of such error proceeding in the supreme court.

APPEAL from the district court for Holt county. Tried below before HARRINGTON, J. *Reversed.*

R. R. Dickson, for appellant.

W. R. Butler, contra.

OLDHAM, C.

This suit originated in an action filed in the district court for Holt county, Nebraska, by Charles W. Ebel for the purpose of foreclosing a real estate mortgage on certain lands situated in that county. There were numerous defendants in this cause of action, among which were the Somerset Trust Company, which filed an answer and cross-petition alleging among other things that in March, 1882, Ralph Ege became the owner in fee simple of the real estate described in plaintiff's petition; that he continued to be the owner until October 22, 1898, when his assignee sold the land to another defendant in said cause of action; that on March 30, 1885, a judgment was obtained in the district court for Holt county against Ralph Ege and others for the sum of \$1,305.62 and costs; that said judgment was sold, assigned and set over to J. L. Roll for a valuable consideration on March 24, 1898; that on the same day Roll sold and assigned said judgment to

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appellant, which was the owner of said judgment, and that no part of the judgment had been paid.

The cross-petition also alleges that an execution was issued on said judgment, April 11, 1895, and that after the rendition of said judgment in the district court that Ege and others within the time allowed by law filed a petition in error in said cause in the supreme court, and gave a supersedeas bond which was duly approved for the purpose of staying said judgment, and that the execution was thereupon returned; and that the case remained in the supreme court until the January term, 1898, when it was affirmed and a mandate was issued thereon which was received by the clerk of the district court of Holt county on March 28, 1898, and spread upon the record of said court. The cross-petition was filed April 5, 1901, and prayed that this judgment be declared a lien on the interest which Ege held in said lands at and after March 28, 1898.

Plaintiff, and other answering defendants, demurred to this cross-petition on the ground that it did not state facts sufficient to constitute a cause of action, and that the judgment alleged on was barred by the statute of limitations. This demurrer was sustained by the district court and cross-petitioner refused to further plead, and his action was dismissed and he brings the case here by appeal.

This case presents but one question, and that is, whether or not the five-year period of limitation on a judgment lien is suspended during the time the issuance of an execution is superseded by bond pending a review in the appellate court? If it is, the judgment of the district court in sustaining the demurrer and dismissing the cross-petitioner's bill was wrong and should be reversed; if it does not, the judgment is right and should be affirmed, because more than five years elapsed between the time the execution was issued and the filing of plaintiff's cross-petition.

It is contended by appellees that as there is no express provision in section 482 of the Code of Civil Procedure for suspending the running of the statute during the time a

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judgment is stayed, we should not read such a provision into the statute and hold that because on sound principles a judgment debtor had by his own act prevented the creditor from issuing an execution during the time the judgment was stayed, he could not at the same time avail himself of the protection of the statute against the judgment lien during all the time of the stay. It is contended that such a construction of the statute would be judicial legislation against a policy plainly declared by the statute.

We must admit that this contention seems to find some support in Sedgwick, Statutory and Constitutional Law, 305, and other eminent text writers who have quoted his remarks on this subject with approval. But this contention has found little favor in courts of last resort of the different states; it being very generally held that when the judgment debtor by his own act deprives the creditor of the means of enforcing the lien of his judgment, he can not avail himself of the running of the statute of limitation during the time the creditor is powerless to enforce his lien. This conclusion was reached by the supreme court of Minnesota in the case of *Wakefield v. Brown*, 37 N. W. Rep. [Minn.], 788, after an able and exhaustive opinion in which numerous authorities, both American and English, were examined. The supreme court of California in discussing this question under a statute which limited the judgment lien to two years, in the case of *Dewey v. Latson*, 6 Cal., at page 134, says: "The obvious intention was to charge the estate of the judgment debtor, and to give the creditor two years to make his money. The statute intended that this time should run from date of the judgment, or period at which the plaintiff was in a situation to take out execution, and pursue his remedy to final satisfaction. By the defendant's own act, the force of that judgment has been suspended, and the lien, which is merely an incident, must share a like fate. It would be absurd to say that a lien attached upon a judgment, and expired by its own limitation, while the judgment was still *in fieri*, and could not be prosecuted to full fruition." This de-

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cision was subsequently adhered to by the same court in *Englund v. Lewis*, 25 Cal., 337; and to the same effect have been the holdings in *Smart & Evans v. Mason*, 2 Heisk. [Tenn.], 223; *Fairbanks v. Devereaux*, 58 Vt., 359, 3 Atl. Rep., 500; *Houck v. Dunham*, 92 Va., 211, 23 S. E. Rep., 238; *Pennock v. Hart*, 8 S. & R. [Pa.], 369.

Appellees make the further contention that after the supersedeas bond was executed by the defendants, the plaintiff might have availed himself of the proceeding provided for in section 591 of the Code of Civil Procedure, and have continued the lien of his judgment by executing to the defendants the obligation therein provided for.

In the first place, this section of the statute only applies to an "action arising on contract, for the payment of money only," and there is nothing in the allegations of the cross-petition to show the nature of the action on which the judgment was rendered; nor was this necessary, for ordinarily the causes of action are all merged in the judgment which becomes a new cause of action. If there was any merit in this contention it should have been pleaded as a defense. It seems to us that it would be manifestly unfair to compel a judgment creditor to resort to this provision to save his judgment from the bar of the statute during the time its operation was suspended by a supersedeas bond executed by the judgment debtor, because even when the bond is given it is still left in the discretion of the trial court to permit the enforcement of the judgment. We are, therefore, of the opinion that the trial court erred in sustaining the demurrer, and dismissing appellant's cross-petition.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

BARNES and POUND, CC., concur.

REVERSED AND REMANDED.

Hayes v. Hayes.

HANNORA HAYES, APPELLEE, v. MORGAN HAYES, APPELLANT.

FILED JANUARY 8, 1903. No. 12,462.

Commissioner's opinion. Department No. 3.

Quieting Title: COLLATERAL ATTACK: EVIDENCE.

APPEAL from the district court for Holt county. Tried below before KINKAID, J. *Affirmed.*

R. R. Dickson, for appellant.

Arthur F. Mullen, contra.

AMES, C.

This is an action to determine the title and right of possession of a tract of land. The only matter in dispute is the validity of an order of the county court of Holt county admitting to probate the last will of a deceased prior owner of the land. The sole ground of attack is that the order was made upon insufficient evidence. We do not feel called upon to discuss, or to cite authorities upon a proposition so long and so well settled as that such an order can not be collaterally attacked for such a reason. *Roberts v. Flanagan*, 21 Neb., 503; Bigelow, Estoppel [5th ed.], 211, *et seq.*

The judgment of the district court upheld the probate court and determined the title accordingly, and it is recommended that it be affirmed.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

Provident Life & Trust Co. of Philadelphia v. Brunner.

**THE PROVIDENT LIFE & TRUST COMPANY OF PHILADELPHIA,
V. THOMAS C. BRUNNER.**

FILED JANUARY 8, 1903. No. 12,471.

Commissioner's opinion. Department No. 3.

**Mortgages: FORECLOSURE: DEFICIENCY: STATUTES: CONSTRUCTION:
ELECTION OF REMEDIES.** Section 848 of the Code of Civil Procedure, as amended by the act of 1897, when taken in connection with the remainder of the title of which it is a part, is a statute compelling an election of remedies and is inoperative upon a suit begun before it went into effect.

ERROR from the district court for Douglas county. Tried below before ESTELLE, J. *Reversed.*

George B. Lake and Hamilton & Maxwell, for plaintiff in error.

John O. Yeiser, contra.

AMES, C.

On May 1, 1897, an action was begun to foreclose a mortgage upon real property which had been given to secure the payment of an indebtedness that fell due January 1, 1897. After a decree of foreclosure and a sale thereunder, and after a confirmation of the sale, the plaintiff applied to the court for and obtained leave to prosecute an action at law to recover a residue of the debt after the application thereon of the proceeds of the sale. A judgment was recovered by the defendant in this action which was prosecuted pursuant to the permission so obtained, and the plaintiff prosecutes a petition in error in this court.

It is not disputed that there is an unpaid residue of the mortgage debt, and the only question presented here is whether it can be recovered by the proceedings above set forth. We think the answer has been given by this court and in favor of the plaintiff in error by the decisions in

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Thompson v. West, 59 Neb., 677; *Patrick v. National Bank of Commerce*, 63 Neb., 200, 88 N. W. Rep., 183.

We do not think it necessary to repeat or recapitulate the reasons adduced in those decisions. We may, however, add thereto our own opinion that section 848 of the Code, taken in connection with the other provisions of the title of which it is a part, is no more than a statute compelling election between two remedies, both of which existed prior to the adoption of the amendment, and neither of which has been taken away. Neither at the time the mortgage became due, nor at the time the action for its foreclosure was begun, was the amended statute in force or operative. At the time the suit was begun, therefore, the plaintiff was not required by law to make an exclusive choice of remedies and there is no ground for a presumption that by beginning the action he intended to do so. He could not have foreseen the results of the litigation nor could he have predicted how long the amendment, if already enacted, would remain unrepealed. At all events it had not yet become restrictive of his liberty of conduct.

The consequences of beginning a suit under an existing law were not affected by a modification of the law subsequently coming into operation.

It is recommended that the judgment of the district court be reversed and a new trial granted.

DUFFIE and ALBERT, CC., concur.

REVERSED AND REMANDED

MORRIS H. KELLY V. THE COUNTY OF DAWES ET AL.

FILED JANUARY 21, 1903. No. 11,911.

Commissioner's opinion. Department No. 3.

1. **Taxation: COUNTIES: PURCHASE BY BOARD: CANCELLATION.** A county board, after having purchased real estate for delinquent taxes in the manner provided by law, cannot cancel or rescind the sale without the full payment of the taxes, penalties, interest and costs on account of which the same was made.

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2. Taxation: COUNTIES: PURCHASE BY BOARD: FORECLOSURE: WHEN ACCRUES. Article 4 of chapter 77 of the Compiled Statutes, entitled "Revenue," is a complete regulation concerning the enforcement of tax liens purchased by counties, and an action to foreclose such liens cannot be begun until after the expiration of two years from the date of sale.

ERROR from the district court for Dawes county. Tried below before WESTOVER, J. *Reversed and dismissed.*

Albert W. Crites, for plaintiff in error.

W. H. Fanning, contra.

AMES, C.

This is an action upon the equity side of the court for the foreclosure of alleged liens in favor of the state and of the county of Dawes and the city and school district of Chadron, for general taxes levied for revenue purposes for the years from 1893 to 1897 both inclusive, upon a tract of land belonging to the plaintiff in error. The plaintiff had judgment as prayed in the court below, and the defendant brings the case here by proceedings in error. There is no dispute as to facts. The land had been sold to the county at treasurer's sale and, at the date of the beginning of this action, two years from the date of the sale had not expired. If this suit had been brought upon the tax sale certificate, its dismissal, as being prematurely begun, would have been required by the authority of *Iodence v. Peters*, 64 Neb., 425, 89 N. W. Rep., 1041. But after the sale and issuance of the certificate, and after an action for foreclosure thereon had been begun and dismissed because of being premature, the county board ordered the certificate and the sale record to be canceled, which was attempted to be done, and this action was then commenced within less than two years from the date of the tax sale, as an action to foreclose in a case in which no sale has been made. It is first objected that this attempted cancellation or rescission is void and the point is, in our opinion, well taken. The county by its purchase had ac-

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quired valuable rights, among which were penalties and costs accruing at the tax sale, and an inchoate right of foreclosure under the statute enacted for that purpose. We do not think it was within the power of the county board to surrender or relinquish these rights, without consideration moving to the county, and that to permit it so to do would be to offer an opportunity for the practice of such favoritisms and inequalities, as between taxpayers, as would be corrupting in their tendencies and against public policy. The county should be treated as being still the owner of the tax sale certificate and entitled to enforce the same in the manner provided by the statute. This suit, although it was not brought on the sale certificate, might perhaps, inasmuch as all the facts are disclosed by the answer, be treated as an action thereon and the judgment of the district court be thus upheld, were it not the fact that it was begun within a little more than a month after the date of the sale, and it must therefore be dismissed as being premature.

The provision of section 2 of article 5 of the revenue law that an action to foreclose may be begun at any time within five years from the date of the tax sale upon which the lien is based must, we think, be regarded as restrained by the provisions of section 1 of the preceding article and by those of section 179 of the revenue act of 1879, so as to limit the right of action by counties until after the expiration of two years from the date of the sale. Article 4 is a regulation complete in itself, concerning the purchase and enforcement of tax liens by counties, and as decided by this court in *The County of Logan v. Carnahan*, 66 Neb., 685, when adequate remedies for the collection of taxes have been provided by statute they are exclusive of all others.

It is therefore recommended that the judgment of the district court be reversed and the action dismissed.

DUFFIE and ALBERT, CC., concur.

REVERSED AND DISMISSED.

City of Omaha v. Gsantner.

THE CITY OF OMAHA V. JOHANNA GSANTNER.

FILED JANUARY 21, 1903. No. 12,303.

Commissioner's opinion. Department No. 3.

1. **Municipal Corporations: TAXATION: INJUNCTION: DEDUCTION OF TAXES FROM PURCHASE PRICE: ESTOPPEL.** That the vendee of real estate deducted from the agreed purchase price certain taxes levied against the property, would not estop him from denying the validity of such taxes in an action to restrain their collection, in the absence of an agreement, between himself and his vendor, that such amount should be retained and applied on the taxes.
2. **Municipal Corporations: STREETS: PAVING, PETITION FOR: CHARGE ON ABUTTING PROPERTY: STATUTES.** The act of 1887, section 69, chapter 12a, Compiled Statutes, incorporating metropolitan cities, authorized any such city to pave any street, alley or avenue within its limits, either with or without a petition of the property owners representing a majority of the feet frontage abutting on such street, alley or avenue; but without such petition the city could not make the cost of paving a charge against the abutting property. Following *Orr v. City of Omaha*, 2 Neb. [Unof.], 771, 90 N. W. Rep., 301.
3. **Municipal Corporations: STREETS: CURBING: CHARGE ON ABUTTING PROPERTY: STATUTES.** Under the act of 1887, when the city has ordered a street paved it may curb and gutter the same and make the expense thereof a legal charge upon the abutting real estate.

ERROR from the district court for Douglas county. Tried below before FAWCETT, J. *Reversed with directions.*

James H. Adams and Charles E. Morgan, for plaintiff in error.

C. J. Smyth, contra.

ALBERT, C.

This action was brought in the district court for Douglas county, for the purpose of enjoining the collection of paving and curbing taxes levied on the property of the plaintiff by the city of Omaha. The petition alleges that these assessments are void for the reason that no valid petition for the paving and curbing had been filed prior to the

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ordering of the same, and that the notices of the sitting of the board of equalization were insufficient.

The answer, for present purposes, may be said to consist of a general denial and an affirmative defense to the effect that the plaintiff became the owner of the property in question, by purchase long after the taxes in controversy were levied, and that, in the purchase of such property, she recognized the validity of such taxes and deducted the amount thereof from the agreed purchase price of the property, retaining in her hands money with which to pay the same, whereby she is estopped to deny their validity.

The reply is a general denial. The court found for the plaintiff, and entered a decree accordingly. The defendant brings error.

But two of the many errors assigned are discussed by counsel. The first relates to the exclusion of certain testimony of the former owner of the property, offered by the defendant in support of its plea of estoppel. The offer was in these words: "The defendant offers to prove by the witness, that, in the purchase of the property in controversy herein from him by the plaintiff, the plaintiff recognized the validity of the special taxes in controversy in this suit and that from the agreed purchase price of the land, the special taxes in controversy herein were deducted and were held out by the plaintiff therefrom and the amount thereof was not paid over by the plaintiff to him, but was retained by the plaintiff." The allegations of the answer in this regard are as follows: "that said Johanna Gsantner became the owner of the said property through a deed from one ——— Johnson and wife, given long since the said taxes were levied; that in said transaction the plaintiff recognized the validity of the said special taxes in controversy herein and deducted the same from the purchase price agreed upon, retaining in her hands money with which to pay the same and the said Johanna Gsantner is and ought to be now estopped from contesting the validity of any of the special taxes in controversy herein."

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We do not think the facts covered by the offer or that portion of the answer quoted, if proved, would have amounted to an estoppel. One of the prime factors of an estoppel is mutuality as to the parties concerned. That "from the agreed purchase price of the land, the special taxes were deducted and held out by the plaintiff therefrom," would not estop her vendor from denying the validity of such taxes, in an action for the balance of the agreed purchase price, in the absence of an agreement between him and the plaintiff that they should be thus deducted and retained. No such agreement is alleged in the answer or shown by the offer; nor was there any evidence tending to show such agreement. We think the offer was properly rejected.

The improvements, for which the taxes were levied, were made when the act of 1887, incorporating cities of the metropolitan class, was in force. The court held the entire tax void, because no sufficient petition for such improvements had been presented to the city authorities. The order for curbing covered the same territory as that covered by the order for paving. The defendant insists that the city had authority to order the paving without a petition and that, as the street was ordered paved, no petition for the curbing was required to give the city jurisdiction to order the curbing and to levy a special tax therefor, and that the curbing tax at least, is valid. The precise question thus presented is fully considered in *Orr v. City of Omaha*, 2 Neb. [Unof.], 771, 90 N. W. Rep., 301, and resolved in favor of the contention of the defendant in this case. On the authority of that case, the paving tax is void, because no petition for such improvement was presented; but the curbing tax is a valid lien against the property.

It is therefore recommended that the decree of the district court, so far as relates to the paving tax, be affirmed, and so far as relates to the curbing tax reversed, and the cause remanded with directions to enter a decree in favor of the defendant as to such curbing tax.

AMES and DUFFIE, CC., concur.

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The decree of the district court, so far as relates to the paving tax, is affirmed, and so far as relates to the curbing tax reversed, and the cause remanded with directions to enter a decree in favor of the defendant as to such curbing tax.

HOLCOMB, J., expresses no opinion.

REVERSED WITH DIRECTIONS.

LOGAN F. JACKSON ET AL. V. JOHN E. MCNATT.

FILED JANUARY 21, 1903. No. 12,305.

Commissioner's opinion. Department No. 1.

1. **Principal and Agent: DISCLOSURE OF AGENCY: LIABILITY OF AGENT.**
An agent who fails to disclose the fact of his agency but represents himself as principal, leading a stranger to deal with him as such, will be liable as principal.
2. **Appeal and Error: VERDICT WRONG.** Where a verdict is clearly and manifestly wrong it will be set aside on error.
3. **Principal and Agent: DISCLOSURE OF AGENCY: RECOVERY OF PAYMENT: VENDOR AND PURCHASER.** A vendee under an executory contract for the sale of land paid to the agents of the vendor \$100 cash, \$2,400 to be paid upon delivery of the deed to the premises. The receipt for the cash payment was signed "E. J. W. per W. & J." The vendee also took from the agents an order upon the tenant to deliver to him the crops for the current year, which order was signed "W. & J., Attys. for E. J. W." There was also delivered to vendee a lease from E. J. W., the owner, to G. A., a tenant, signed by "E. J. W. by W. & J. his agts. & Attys.," upon the back of which was an assignment of the rights of E. J. W. in the lease to vendee, the same being signed by "E. J. W. by W. & J., his attys." Vendee rescinded, and within a few days after payment of the \$100 cash, brought an action in Iowa against E. J. W. *Held*, That in an action against the agents for the recovery of the cash payment after rescission, the unsupported testimony of vendee that one of the defendants had stated at the time of making the contract that he owned the greater part of the land, and that E. J. W. did not have an interest therein, which testimony was denied by defendants, was insufficient to charge the defendants as principals.

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ERROR from the district court for Otoe county. Tried below before JESSEN, J. *Reversed.*

W. F. Moran, E. F. Moran and L. F. Jackson, for plaintiffs in error.

John C. Watson, John V. Morgan and S. J. Stevenson, *contra.*

KIRKPATRICK, C.

On the 30th day of June, 1890, John E. McNatt filed his petition in the district court of Otoe county against Logan F. Jackson and Edwin F. Warren, partners, in which he alleged that on or about the 3d day of November, 1899, plaintiff and defendants entered into a verbal contract providing for the sale to plaintiff by defendants of certain real estate, describing it, and situated in Fremont county, Iowa, the agreement being that plaintiff should pay \$2,500 for the premises; that defendants should make a good title in fee simple, and deliver a good and sufficient deed thereto within a reasonable time; that plaintiff should deposit with defendants the sum of \$100 cash, the balance of \$2,400 to be paid on receipt of the deed; that plaintiff did deposit \$100 cash with defendants, to be retained by them and applied on the purchase price if plaintiff completed the purchase and received the deed, but to be returned to him if defendants failed to fulfill their agreement to supply a good and sufficient deed in pursuance of the agreement alleged. Plaintiff alleged that defendants represented to him that they were the owners of the premises, that they could deliver a good and sufficient deed, and that the title to the premises was perfect; that relying upon these representations, he was induced to make the contract and the cash deposit mentioned; that at the time of the agreement, defendants were not the owners of the premises, never had been, and never possessed any interest therein, and that the title thereto was

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not perfect; that plaintiff has always stood ready to perform his part of the agreement; that defendants had never at any time given plaintiff a good and sufficient deed, having wholly failed and neglected so to do; that he had demanded the return of the cash payment of \$100, which had been refused; that he had sustained a loss of \$100 and, in addition thereto, \$50 as interest on the \$2,400, which through fault of defendants he had been obliged to keep idle and ready to complete the purchase, the petition concluding with prayer for judgment accordingly.

For answer defendants denied the allegations of the petition, and pleaded that on November 3, 1899, one Elmer J. West, was the owner of the premises; that defendants were his agents, and as such entered into a contract in writing in the name of, for and on behalf of West, with plaintiff for the sale of the premises; the written agreement being set out in the petition as follows:

"November 3, 1899. Received of John E. McNatt the sum of one hundred dollars, to apply on purchase price of Iowa farm, described as follows: the southeast quarter and the east half of the southwest quarter of section twenty-six (26), township sixty-nine (69), range forty-four (44), in Fremont county, Iowa; balance, twenty-four hundred dollars, to be paid on delivery of deed of said premises to said McNatt within a reasonable time, or as soon as the same can be procured from present owners. It being understood that all taxes now due thereon shall be paid by said grantors. (Signed.) Elmer J. West, per Warren & Jackson, agents."

That thereupon plaintiff paid to defendants as agents of West, \$100; that their agency for West was fully disclosed to plaintiff before signing the agreement set out; that defendants had no right to the money so paid except as agents of West; that prior to the making of the contract, defendants had fully informed plaintiff as to the status of the title to the premises, and that with full knowledge of the same, plaintiff agreed to purchase as provided in the agreement mentioned; that plaintiff had

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refused to perform his part of the contract, although defendants had procured deeds from West, their principal, and were at all times ready to deliver the deeds as agreed; that defendants had expended the \$100 cash payment, with the knowledge, consent and concurrence of plaintiff, for taxes due and other matters incidental to the transfer, and that they had fully accounted to their principal West for such expenditure before any demand for repayment had been made by plaintiff.

A reply was filed, denying generally all the allegations of new matter in the answer. There was trial to the court and a jury, a verdict for plaintiff and judgment thereon. Warren and Jackson, defendants below, present error in this court, alleging that there is error in the instructions given, and in the refusal of others requested, and further that the verdict is not sustained by sufficient competent evidence.

The view that we entertain of the evidence as preserved will make it unnecessary to consider many of the errors assigned. The court instructed the jury upon its own motion as follows:

"No. 5. When a party acts and contracts avowedly as the agent of a disclosed principal, his acts and contracts, within the scope of his authority, are considered the acts and contracts of the principal, and involve no personal liability on the part of the agent.

"And if you shall find from the evidence that the said defendants were the agents of one, Elmer J. West, for the sale of the lands in question, and that they acted within the scope of their authority in making the sale of the lands in question, and that the plaintiff knew that the said defendants were the agents of said West in making the same, you are instructed that the defendants are not personally liable, and your verdict will be for the defendants, and this will end your investigation in this case."

It is apparent from the verdict returned that the jury did not believe from the evidence that plaintiff knew when he made the contract that defendants were agents for

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West, but did believe that defendants represented themselves to plaintiff, and that the latter believed they were the owners of the premises in fee. It seems to us that the slightest inspection of the record will make it clear and manifest that defendants were not the owners of the premises, but were in fact dealing with relation thereto as the agents for Elmer J. West, the owner. They were by him authorized to sell the property, and it was by virtue of this authority that they entered into the negotiations with McNatt. As to this proposition, there can, we think, be no disagreement among fair minds, and it must be assumed that the jury based defendant's liability upon the sole ground that they actively led McNatt to believe they were the owners at the time they dealt with him.

This is an action for money had and received, to recover part purchase price under an executory contract for the sale of land after plaintiff has elected to rescind. It has been many times decided that such action will lie. *Wright v. Dickinson*, 67 Mich., 580. The theory of plaintiff was that defendants had led him to believe that they dealt regarding the land as the owners, and were therefore liable for the cash payment, the same as if in fact they had not been agents. It is a well established principle that where an agent fails to disclose his agency when making the contract, and deals with a third person as being himself the principal, he will be liable as principal, the reason for the rule being that the party deals with the undisclosed agent upon the latter's credit, and is not bound to inquire whether the pretended principal is or is not in fact an agent. The duty is upon the agent to disclose his agency, not upon others to discover it. Many cases announce this doctrine. *Bickford v. First National Bank of Chicago*, 89 Am. Dec. [Ill.], 436; *Baldwin v. Leonard*, 94 Am. Dec. [Vt.], 324; *The York County Bank of Pennsylvania v. Stein*, 24 Md., 447; *McClellan & Hillyer v. Parker*, 27 Mo., 162; *Beymer v. Bonsall*, 79 Pa. St., 298.

It was, therefore, proper for the court to instruct the jury in this case that plaintiff could not recover if he

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knew defendants were the agents of West when he entered into the contract with them. They must therefore have found that he did not know of their agency, and that they did not disclose such agency. Under the view we take of the record, the one question for determination is whether the evidence is sufficient to sustain a finding that plaintiff did not know of the agency of defendants. If, in this regard, it is insufficient the judgment must be reversed.

Plaintiff McNatt testified at the trial as follows: "I asked them (defendants) who owned this land, and Mr. Jackson said he owned the biggest interest in it. I asked him if Elmer J. West owned any interest in it, and he said he didn't own a dollar in it, and it was just a smuggling piece of business." Beyond this there is no evidence anywhere in the record tending to support the theory of McNatt that defendants concealed from him their agency, and that he dealt with them as principals. Upon this question there is a sharp conflict between the testimony of McNatt and defendants, both of whom testified that they made a full disclosure of their agency. If the record showed nothing more than this conflict, it would be necessary under the repeated holdings of this court to regard the jury's verdict as conclusive.

But there are many circumstances shown by the record which tend to override the supposition that McNatt did not know he was dealing with the agents of West. The receipt given to McNatt upon payment of the \$100 cash when the contract was made is signed "Elmer J. West, per Warren & Jackson," as introduced by McNatt in evidence; but defendant Jackson testified positively that the word "agents," following the name of the firm, was upon the paper as originally given, and had been erased. He had signed the paper himself and had written "agents" thereon. The original receipt was offered in evidence, and our examination of it has left us wholly in doubt whether there was any attempted erasure of a portion of it or any alteration. The letterpress copy of it was offered by defendants, and, as it appears of record, the word "agents"

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follows the names of Warren & Jackson. . Within a few days after the election of McNatt to rescind the contract, it is shown that he filed an action in one of the courts of the state of Iowa, against Elmer J. West, and in the petition filed in that action, he set out in full the receipt heretofore quoted, and as it there appears of record, the word "agents" follows the firm name of Warren & Jackson. McNatt testified that he could not remember that the word "agents" had been upon the paper, and did not think there had been an erasure.

But, at any event, the receipt was taken by McNatt signed by "Elmer J. West per Warren & Jackson." Here was certainly direct notice to McNatt that he was not dealing with the owner, but rather through others pretending to deal under some manner of authority from the owner who was named. The receipt plainly says that the money was received by Elmer J. West through Warren & Jackson. Whether they are therein designated as agents, or appear without designation, may be regarded as immaterial, for it is apparent that the dealings were being had with West through certain persons holding themselves out as having authority to bind the owner. This receipt was retained by McNatt until produced by him at the trial.

On the next day after the giving of the receipt, defendant Jackson accompanied McNatt to Sidney, Iowa, for the purpose, as the latter testifies, of paying the taxes due on the land. He says that the taxes were paid in the presence of McNatt, and the receipt given to him. This testimony is admitted by McNatt. The treasurer's tax receipt, which was produced at the trial, receipts the payment by Elmer J. West of \$39.49 in full for the taxes for the year 1898.

On the same day on which the receipt for \$100 was given to McNatt, there was also delivered to him the following order:

"Nov. 3, 1899. To Green Acord: Mr. John McNatt has this day purchased the farm now occupied by you, and you will please deliver to him the rent for the year 1899, he having purchased the farm together with the landlord's

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share of the crops for this year. (Signed.) Warren & Jackson, Attorneys for Elmer J. West."

There was also delivered to McNatt at the same time a lease of the premises, being a memorandum of agreement dated September 15, 1899, between Elmer J. West and Green Acord. It is signed "Elmer J. West, by Warren & Jackson, his agts. & Attys. G. B. Acord." Before delivering this paper to McNatt, the following indorsement was made on the back thereof: "Nebraska City, Neb., Nov. 3, 1899. For value received, the said Elmer J. West hereby assigns all his interest in the within lease to John E. McNatt, said McNatt having this day purchased the premises leased and takes the same subject to all the rights of the said Elmer J. West. (Signed.) Elmer J. West, by Warren & Jackson, his attys."

We are at a loss to conceive how, under the evidence set out, a reasonable and prudent man could deal with persons in a transaction involving \$2,500 in the honest belief that such persons were the real owners of the premises, when in all the papers and instruments issued or transferred by them they invariably designated themselves as the agents or attorneys of another, who purports to be the real owner, and who is repeatedly named as such. Nor can we see how a jury, with this evidence before them, could believe that McNatt dealt with the defendants in the faith and belief that they were not the agents of West duly authorized by their principal to make the sale of the premises. Their verdict should have been for the defendants because the evidence shows that they were the agents of West and that their agency was fully known to McNatt.

It has been many times said by this court that a jury's verdict is ordinarily conclusive upon a disputed question of fact, but this principle does not apply in this case. McNatt does not even testify that he believed the defendants were the owners, and his unsupported statement that one of the defendants represented himself to be an owner and not an agent is completely overborne by the evidence in the record. The judgment is wrong and it is therefore

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recommended that the same be reversed, and the cause remanded for further proceedings.

HASTINGS, C., concurs.

REVERSED AND REMANDED.

FIRST NATIONAL BANK OF NORTH PLATTE, NEBRASKA, APPELLEE, v. JAMES A. TYLER, APPELLANT, ET AL.

FILED JANUARY 21, 1903. No. 12,435.

Commissioner's opinion. Department No. 1.

1. **Mortgages: FORECLOSURE: APPRAISAL: VALUATION: FRAUD.** On the hearing of a motion to confirm the sale of real estate, it appeared that the value of the land as fixed by the appraisers was \$4,000. Seven witnesses fixed the value at \$4,800, and five fixed it at \$3,200. *Held*, That the ruling of the trial court, sustaining the appraisement, was not erroneous.
2. **Mortgages: FORECLOSURE: APPRAISAL: DISINTERESTED FREEHOLDER.** One of the appraisers at a judicial sale, a long time prior to the appraisement, had, on behalf of another, inquired of the owner of the land his price for the same and of the owner of the decree his price for the decree. The negotiations were dropped, the appraiser by affidavit stating that these dealings with reference to the land had in no way influenced his judgment in appraising the property. *Held*, That the trial court did not err in refusing to vacate the sale on the ground that the appraiser was not a disinterested freeholder.

APPEAL from the district court for Dawson county.
Tried below before SULLIVAN, J. *Affirmed*.

E. A. Cook, for appellant.

G. W. Fox, contra.

KIRKPATRICK, C.

This is an appeal from an order of confirmation entered by the district court of Dawson county in a sale on a mortgage foreclosure. Objections were made to the appraisement and to the sale, which were overruled, and the cause

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is brought to this court upon appeal. The ruling of the trial court is assailed on two grounds: (1) That the appraisement of the property was too low; and (2) that one of the appraisers who acted with the sheriff was not a disinterested person within the meaning of the statute. Upon the first question, the affidavits of seven witnesses were filed, each of whom testified that the land covered by the decree was worth \$4,800. On the other hand, five witnesses made affidavit that the property was worth not to exceed \$3,200. The value of the property was fixed by the sheriff and the appraisers at \$4,000. The property consisted of 160 acres of land in Lincoln county, with improvements on it, which were valued at \$1,000. It is clear that we can not interfere with the ruling of the trial court in relation to the valuation of the property. The affidavits of the seven witnesses are not sufficient to overcome the appraisement, properly and regularly made, when the same is supported by the affidavits of an almost equal number who fix the value of the property at much less than that fixed by the appraisers. There is no claim that the appraisement was in any way fraudulent, and it appears that the trial court was right in finding that the appraisement was properly made.

As to the question that one of the appraisers was not a disinterested person, the owner of the land filed an affidavit in which he sets out that C. J. Weldon, who was the appraiser regarding whose qualifications complaint is made, some time prior to the appraisement, came to the owner and asked him whether he did not want to sell the land, and also asked him his price therefor; that Weldon went to appellee, the owner of the decree in this case, and attempted to buy the decree. Weldon made affidavit that in making these inquiries he was acting on behalf of his brother, who desired to buy the land; that he was requested by his brother, long prior to the appraisement, to see the owner and ascertain at what price he would sell the land, and also to inquire of the owner of the decree at what price he would dispose of his decree; that he communi-

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cated the information he received by these inquiries; that the prices named were unsatisfactory; that the negotiations were thereupon wholly dropped; that this occurred long prior to the appraisement; that he was wholly disinterested, and that the fact that he had had the negotiations on behalf of his brother had in no way affected his judgment in fixing a valuation upon the property. These two affidavits are the only testimony on this question. We are of opinion that it was wholly insufficient to justify the trial court in vacating the appraisement.

The judgment of the trial court is in all respects right, and it is therefore recommended that the same be affirmed.

HASTINGS and LOBINGIER, CC., concur.

AFFIRMED.

CHARLES CHILDS ET AL. V. EVERARD D. FERGUSON.

FILED JANUARY 21, 1903. No. 12,465.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: PLEADING: MOTION TO MAKE MORE SPECIFIC: PREJUDICE.** Where the ruling of the trial court upon a motion to require a more specific statement in a pleading does not appear to have resulted in prejudice to the complaining party, such ruling will afford no ground of complaint.
2. **Judgment: DEFAULT: VACATION: PLEADING: PRESUMPTIONS: DISCRETION.** Where a defendant files a motion to set aside a judgment rendered against him by default, he must not only accompany his motion with a duly verified answer, showing a meritorious defense, but must also state a satisfactory reason excusing his default, and, in the absence of the latter showing, it will not be presumed that the trial court abused its discretion in overruling the motion.

ERROR from the district court for Sarpy county. Tried below before SLABAUGH, J. *Affirmed.*

Hall & McCulloch, for plaintiffs in error.

Connell & Ives, contra.

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KIRKPATRICK, C.

This is a suit to foreclose a mortgage brought in the district court of Sarpy county by defendant in error against plaintiffs in error. In addition to the usual allegations, plaintiff pleaded as follows:

"6. On or about the 7th day of March, 1895, the said Charles Childs and Catherine J. Childs made, executed and delivered to plaintiff their certain warranty deed of said date conveying to him the above described premises, together with other premises, which said warranty deed was thereafter, on the 20th day of April, 1895, filed for record in the office of the county clerk of said Sarpy county, and there recorded in book 29 of the records at page 137, but said warranty deed, although in form absolute, was in truth and fact given as security for certain indebtedness of said Charles Childs, other than that hereinbefore mentioned, and is now in the process of foreclosure in the circuit court of the United States for the district of Nebraska; the plaintiff herein not being able for lack of federal jurisdiction to foreclose the mortgage herein counted upon in said United States court, for the reason that the said Omaha Loan & Trust Company is a citizen of the same state as the defendant Charles Childs.

"7. On or about the 17th day of December, 1897, the plaintiff by his warranty deed, while holding the legal title to said premises, with the consent of the defendants herein, sold and conveyed to one William F. Schmidt a part of said mortgaged premises described as follows" (giving description of the premises conveyed).

Plaintiffs in error filed a motion to make the petition more definite and specific, which, omitting formal parts, is in the words following:

"Now comes the said defendant and moves the court to require the plaintiff to make his petition more definite and certain in this: that the said petitioner be required to set out in what way the said deed of March 7, 1895, was a mortgage, and whether any written instrument was made

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by and between the plaintiff and the defendant, defining the extent and nature of said deed, or whether said deed was taken as a mortgage by verbal declaration alone, and if said deed was limited and made a mortgage by writing, that the said plaintiff be compelled to set out and attach to his said petition the writing limiting and controlling said deed."

This motion seems to have been taken up during the term of the district court in Sarpy county, and by the court overruled. Thereupon, on the same day the suit was called for trial, defendants apparently being absent. Evidence was offered by plaintiff and a decree of foreclosure duly entered by the trial court. Some seventeen days afterwards, and apparently during the same term of court, plaintiffs in error filed a motion, which, omitting formal parts, is as follows:

"Come now the defendants and move the court for an order setting aside the default and decree hereinbefore entered herein, and granting leave to the defendants to make their answer herein, said answer is submitted herewith."

This motion was overruled, and an exception taken, and from the judgment defendants prosecute error to this court. Two errors are assigned: first, that the court erred in overruling the motion to make the petition more definite and certain; second, that the court erred in overruling the motion to set aside the default, and permit the defendants to answer.

It is disclosed by that portion of the petition quoted that defendant in error did not rely upon the warranty deed which had been given, and which seems to have been in no way connected with the mortgage in suit, but the matter seems to have been referred to for the purpose of showing the nature of the transaction by which defendant in error conveyed a certain portion of the mortgaged premises with the consent of plaintiffs in error, and for the purchase price of which plaintiffs in error received credit. This being true, we are unable to see what pos-

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sible effect the warranty deed in question had upon the rights of plaintiffs in error in the foreclosure suit. If plaintiffs in error were in no way prejudiced by the order of the trial court overruling the motion to make the petition more definite and specific, they can not predicate error upon such ruling. In *Phenix Ins. Co. of Brooklyn v. Covey*, 41 Neb., 724, it was said: "Where no prejudice has resulted from the ruling of the trial court upon a motion for a more specific statement, such ruling will afford no ground of complaint." It seems clear, therefore, that the action of the trial court in overruling this motion can not be held error.

It is next contended that the trial court erred in overruling the motion quoted above to set aside the default, and permit plaintiffs in error to answer. It may be conceded for the purposes of this consideration, that the answer stated a defense to the cause of action set out in the petition, although this is exceedingly doubtful from the fact that the instrument of defeasance executed and delivered to plaintiffs in error by defendant in error at the time they executed to him the warranty deed, and which instrument was attached to and made a part of the answer tendered, recites as follows: "Fourth. Neither the said deed to me nor these presents shall invalidate, merge, or in any manner effect any mortgage lien which I now have upon any of said premises."

It seems to have been the intent of the parties that the transaction involving the execution and delivery of the warranty deed and the defeasance of the same, should have nothing to do with the mortgage in suit in the case at bar. So that, as intimated, there is grave doubt that the answer stated a defense. Assuming, however, that it does state a defense, no showing of any kind is made and no reason given why plaintiffs in error did not answer and why they permitted judgment by default to be entered against them. The rule seems to be settled in this state that to entitle a party who has had a judgment entered against him when in default of a pleading, to have such

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default judgment set aside and to be permitted to plead, he must not only tender a pleading stating a defense but present to the court facts which go to excuse his failure to plead. It may be said that the usual practice of the courts is to permit a party upon application seasonably made to present any matter of defense by proper pleading that he may have; and yet, there is in the record in the case at bar an entire absence of anything tending to show that the trial court in any way abused its discretion or committed any error in the matter of overruling the application to set the default aside.

In *Lichtenberger v. Worm*, 41 Neb., 856, it was said: "It is the duty of the district court to afford to defendants a full opportunity to present their defense, but it is also its duty to prevent unnecessary delays and discourage frivolous proceedings. In reviewing orders affecting the procedure in a case, this court will presume, in the absence of evidence to the contrary, that the district courts have acted with due regard to both principles."

From the filing dates upon the pleadings in the record before us, it is disclosed that the suit was begun on January 23, 1900. On January 28, 1900, a stipulation was filed giving defendants (plaintiffs in error) thirty days from February 26, to plead. On May 17, 1900, several months out of time, their motion to make the petition more definite and specific was filed, and it was not until December 4, 1900, that the motion was overruled and a decree entered. On December 21, the motion to set aside the decree was filed and overruled. From an examination of the entire record, it is apparent that the proceedings of the trial court are free from error, and it is, therefore, recommended that the judgment be affirmed.

HASTINGS and LOBINGIER, CC., concur.

AFFIRMED.

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UNION SAVINGS BANK, APPELLEE, v. LINCOLN NORMAL
UNIVERSITY ET AL., APPELLEES, IMPEADED WITH
SIMON D. SWAB, APPELLANT.

FILED JANUARY 21, 1903. No. 12,504.

Commissioner's opinion. Department No. 3.

1. **Mortgages: FORECLOSURE: APPRAISAL: OBJECTIONS, WHEN MADE.** Objections to the appraisement of property to be sold at judicial sale, to be available, must be made before the sale.
2. **Mortgages: FORECLOSURE: APPRAISAL: OBJECTIONS, HOW MADE.** Such objections should be made in such language as to indicate with reasonable certainty the specific objections relied upon.
3. **Mortgages: FORECLOSURE: APPRAISAL: OBJECTIONS: EVIDENCE: PREJUDICE: APPEAL.** Where the evidence offered in support of the objections is of such a character as to warrant a finding that the irregularities complained of were without prejudice to the party resisting confirmation, an order overruling such objections and confirming the sale will not be disturbed on appeal.
4. **Mortgages: FORECLOSURE: PURCHASE BY PARTY: INJUNCTION, VIOLATION OF: CONFIRMATION.** The fact that a party to the action, who afterward became the purchaser of the property, violated an injunction, prior to the sale, in regard to the property covered by the decree, is not of itself sufficient ground for refusing confirmation.

APPEAL from the district court for Lancaster county.
Tried below before CORNISH, J. *Affirmed.*

Samuel J. Tuttle, for appellant.

Tibbets Bros., Morey & Anderson, contra.

ALBERT, C.

A decree was entered on the 7th day of May, 1900, and gave the plaintiff, the Union Savings Bank, a first lien for \$1,924.30, the defendant Columbia National Bank a second lien for \$8,100, the defendant Henry Carr a third lien for \$5,729.35 and the defendant Simon D. Swab a fourth lien for \$428.75. Afterward, Daniel B. Cropsey became the owner of the first three liens. At the time of the

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decree a building on the premises, which gave them their principal value, had been practically destroyed by fire; another building, in which there was a lighting plant, not destroyed by the fire, contained, when the decree was entered, a boiler, engine, dynamo and other appliances for the operation of a lighting plant. It would appear that the defendant Carr claimed a superior lien on these fixtures by virtue of a chattel mortgage; but this claim was disallowed and, by the terms of the decree, he was enjoined from removing such fixtures from the premises. Afterward, and before the appraisement hereinafter mentioned, all of these fixtures, except one boiler, as well as a portion of the brick from the walls of the main building, were removed from the premises by Cropsey. After the appraisement, and before the sale hereinafter mentioned, the remaining boiler was removed from the premises, and the spoliation of the main building continued. An order of sale issued and the sheriff summoned appraisers who, with the sheriff, appraised the property. They appraised its gross value at \$20,000 and, as certificates of liens were waived, the interest of the defendants was appraised at \$20,000. Afterward the premises were sold to Cropsey, the owner of the first three liens, for \$13,335, a trifle more than two-thirds of the appraised value. The defendant Swab filed objections to the appraisement as well as to the confirmation of the sale, which were overruled and the sale was thereupon confirmed by the court. From the order of confirmation, the defendant Swab, appeals to this court.

The first objection argued is, that the appraisement was not of the property of the defendant mortgagor, but of the interest of such defendant and the other defendants, including the defendant lien-holders, in the premises. This specific objection was not made until after the sale and for that reason, whatever its intrinsic merits, we think it comes too late. Counsel contends that one of the objections to the appraisement, namely, that "the appraisement is far below the value thereof," is broad enough to cover

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the objection under consideration. We do not think so. It is the duty of one objecting to an appraisal to specify his objections with reasonable certainty. There is nothing in the objection quoted to indicate that the party making it intended to rely on the one now urged upon this court for a reversal of the order. Neither do we concur with counsel in the proposition, urged in this behalf, that the property appraised was not sold. The appraisers found the gross value of the property; there were no liens to be deducted because of the waiver of certificates thereof, so the interest of the defendants was appraised at the same as the gross value. The return of the officer shows a sale of the property not of any particular interest therein. It is clear, therefore, that the property sold was the property appraised, so far as the objection under consideration is concerned.

Other objections are based on the removal of certain of the fixtures and *debris*, after the decree and before the appraisement and sale. A large amount of testimony was taken in support of these objections. From such evidence, the court was warranted in finding that the property sold for its fair value as it stood at the time of the sale; that had none of the fixtures or *debris* been removed, or had the value thereof been added to the selling price, the value of the property or the amount realized from the sale thereof, must still have fallen far short of sufficient to satisfy the liens prior to that of the defendant resisting the confirmation. That being true, the court was warranted in finding further that the acts complained of were without prejudice to such defendant. Indulging the presumption which this court must indulge in favor of the acts and orders of the district court, if there be any error in overruling these objections, it is error without prejudice to the party now making complaint.

Another contention of the appellant is that a part of the property was removed in violation of the injunction. We have already considered the objections based on the removal of the property. That a part of it was removed in

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violation of the injunction does not necessarily add to the force of those objections. The violation of the injunction was possibly, contempt of court; the removal of the property without good cause, had there been no injunction, would doubtless have been the same. But refusing confirmation is not necessarily one of the punishments for contempt of that character because, where there are many parties interested, such punishment would fall as heavily on the innocent as on the guilty. That being true, what has heretofore been said in regard to the removal of the property disposes of this objection.

It is recommended that the order of the district court confirming the sale be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

THE CITIZENS STATE BANK OF WOOD RIVER, NEBRASKA,
APPELLANT, v. EDWIN S. G. PORTER ET AL., APPELLEES.

FILED JANUARY 21, 1903. No. 12,508.

Commissioner's opinion. Department No. 1.

1. Attachment: AFFIDAVIT: PLEADING NON-RESIDENCE: JURISDICTION.

An affidavit for attachment which states that defendant "has removed from the state of Nebraska to the state of Utah, where he now resides," shows sufficiently the non-residence of defendant to give the court jurisdiction to issue an attachment.

2. Attachment: LEVY: REQUISITES: APPRAISAL. A levy of attachment by leaving at the attached premises a copy of the writ with a tenant and then going half a mile and getting one appraiser, and then going three-quarters of a mile farther to get another, and then telling them that a levy had been made on the lands in question and swearing them and making the appraisement, does not comply with section 205 of the Code, nor make a valid levy, it not appearing that the levy itself was in the presence of any witness.

3. Husband and Wife: VENDOR AND PURCHASER: CONSIDERATION: PRESUMPTIONS. Where land has been by a man and wife conveyed to a third party for a full expressed consideration, and by that third party to the wife for a slightly greater expressed consideration by a deed of a few days' later date, and it is alleged that both deeds

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were without consideration, but the allegation is denied, it cannot be presumed, in the absence of all proof on the subject, that the deeds were without consideration and made merely to put the title in the wife's name.

4. Judgment: EVIDENCE AS BETWEEN THIRD PARTIES. As between third parties a judgment is not of itself proof of any of the facts necessary to support it as between the parties to it.

APPEAL from the district court for Hall county. Tried below before THOMPSON, J. *Affirmed.*

O. A. Abbott, for appellant.

H. A. Edwards and *W. A. Prince*, contra.

HASTINGS, C.

This case is a creditors' bill brought by the appellant to enforce a judgment on attachment. After obtaining judgment and order of sale in a proceeding against E. J. Porter as a non-resident, appellant brought this action to subject 160 acres of land in Hall county, alleging the attachment proceedings and recovery of judgment thereunder on March 26, 1901, and alleging further that January 2, 1900, Porter and wife conveyed the land to one C. E. Brewer for an expressed consideration of \$1,500 which deed was filed for record on the 23d day of the same month; that on February 16, Brewer and wife conveyed by quit-claim deed the same premises to Porter's wife for an expressed consideration of \$1,600; that this deed was filed for record on the 5th day of March, following. The deeds are alleged to have been without consideration and with the intent and for the purpose of hindering, delaying and defrauding plaintiff and Porter's other creditors. It is alleged that the attachment judgment was recovered on a note dated December 8, 1899; that when it was made Porter did not reside upon the premises and has not since; that February 16, 1900, he removed, with his wife, to the state of Utah, where he has since resided, and that the premises were of the value of \$4,500. It is alleged that one

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Lizzie Armstrong, claims to have a mortgage on the land for \$2,500, but it is denied that anything is due. The premises were alleged to be in the possession of a tenant, who was made a party under the name of John Doe.

Porter and his wife answer admitting the commencement of an action and attempted issuance of an order of attachment, and allege that no undertaking for such an order was given. They denied the issuance or levy of any valid order of attachment; say that the only affidavit for such attachment was filed in the county court and alleges no facts sufficient to authorize any attachment to issue and fails to show the non-residence of Porter; they admit that the action was certified to the district court, but deny any jurisdiction of that court to issue any attachment; they say that no levy of any such attachment was made as required by law; that no service of summons in that action was made upon Porter and he made no appearance in it, and deny any jurisdiction over defendants or their property in that action; they admit the transfers of the land but deny that they were made fraudulently or without consideration; allege the value of the premises to be no more than \$3,500; assert there was at the time of the transfers a valid mortgage thereon for \$2,500; that they are husband and wife and have children under the age of eighteen years and that these premises were during all of the times mentioned in said petition their homestead; that they have no other lands and while they did not at the time reside upon the premises they intended to return to them.

A supplemental petition alleged that the land had been conveyed by Porter and wife to one Edmund Wilcox pending the action with notice thereof, and Wilcox and wife were made parties.

Plaintiff replied to the answer of Porter and wife, admitting their relationship; admitted that the affidavit for attachment was as alleged; admitted that the officer's return on the attachment showed no levy in the presence of two residents of the county, and was correctly copied in the exhibit to defendant's answer, and denied that the

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premises were the homestead of Porter and wife at the time of the several transfers.

Wilcox and wife answered alleging a purchase of the premises on April 15, 1901, for \$850 and the assumption of the \$2,500 mortgage; that this was a fair price for the land; that the premises at that time and at the time of the transfers of February, 1900, were the homestead of Porter and wife and exempt from execution and attachment, and denied generally.

Mrs. Armstrong set up her mortgage of \$2,500, but asked no foreclosure and to her answer no reply was made; the court found generally for the defendants and entered a decree for dismissal and for costs. Plaintiff appeals and insists that it obtained a lien by the issuance and levy of the attachment; that the conveyances of the premises to Brewer, and by Brewer to Porter's wife, were without consideration; that the conveyance subsequently by Mrs. Porter and her husband to Wilcox was with full notice and subject to the lien of plaintiff's attachment and that it is entitled to have that attachment enforced against the land.

Defendants urge six reasons why the plaintiff is not entitled to such relief: 1st. That the attachment was not on the ground of fraud, and the creditor's bill cannot introduce that element by way of supporting the attachment. 2d. That the affidavit of attachment is fatally defective and does not disclose any right to the writ. 3d. That there was no levy of the attachment on these lands in the manner pointed out by the statutes of Nebraska. 4th. That no evidence was introduced to show the fraudulent alienation of this property. 5th. No evidence was introduced tending to show the incurring of this indebtedness prior to the transfers; that the judgment in attachment alone, was introduced and, as against Wilcox, who was denying plaintiff's allegations, it was no proof and does not even recite when the indebtedness was incurred. 6th. That the property was a homestead at the time it was conveyed and therefore could not be fraudulently alienated.

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To the first point no authority is cited. The objection that a creditors' bill can only be used to enforce an attachment lien obtained on the ground of fraud, does not seem to be well taken. If the lien exists on any ground and its enforcement is fraudulently prevented, no reason is seen why a court of equity should not be invoked to remove the fraudulent conveyance that is in the way. If ground enough appears for the attachment in the first instance, and for equitable interference in the second, no reason is seen for refusing it since the case of *Westervelt v. Hagge*, 61 Neb., 647, 85 N. W. Rep., 852, and its holding that a creditors' bill may be based upon an attachment lien and judgment. It should be added that the objection is not based on fact. The affidavit for attachment alleges a fraudulent conveyance of the land.

The objection that the affidavit in attachment is defective seems no better. The affidavit states, among other things, that Porter "secretly left the state of Nebraska and removed to the state of Utah where he now resides." This seems at least sufficient to give the court jurisdiction to issue an attachment. A mere statement that defendant was "a non-resident of this state" would be sufficient. An allegation that he had removed from Nebraska to Utah and resides there would seem to cover this ground, at least sufficiently so that jurisdiction would attach. If jurisdiction was obtained, no mere error or irregularity would avoid the lien in a collateral proceeding. *Winchell v. McKinzie*, 35 Neb., 813.

In that case failure to attach the county court's seal to an order of attachment was held a mere irregularity which did not avoid it as against a third party. In *Connelly v. Edgerton*, 22 Neb., 82, an irregular levy, where the officer attached the property in the presence of "two credible persons," naming them, and subsequently had it appraised by two others, "householders," was held good as against a collateral attack. It was held that the appraisement if attacked could have been remade or the return amended.

A more serious question is raised as to the levy. The

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sheriff did not strictly follow the law in making it. His return was as follows:

"I hereby certify that on the 11th day of January, A. D. 1901, I served the within writ by levying the same upon the northeast quarter ($\frac{1}{4}$) of section one (1) in township eleven (11) north of range twelve (12) west of the 6th principal meridian in Hall county, Nebraska. I then called to my assistance C. H. Moats and H. H. Boring, two disinterested freeholders, residents of said county, and administered to them an oath impartially to appraise the interest of E. C. Porter, defendant, in said lands and tenements upon actual view thereof, and I, together with said C. H. Moats and H. H. Boring, made an appraisement in writing of said lands and tenements, which appraisement is hereto attached.

"I also delivered to John Massey a certified copy of this writ with all indorsements thereon, he being the present occupant of the above described lands.

"S. N. TAYLOR, *Sheriff*."

He testified that he went to the farm, delivered a copy of the attachment to the tenant, went on about half a mile east and found one appraiser; took him about three-quarters of a mile further east to the house of a second one, where he told them he had attached the land, swore them and took their appraisement. It is a level stretch of country and the land was in sight and the appraisers familiar with it. It, however, can not be claimed that this complied with the requirements of section 205 of the Code. This section and its effect have been fully discussed in *Ames v. Parrott*, 61 Neb., 847, 86 N. W. Rep., 503. It is there held that the requirements that the officer go to the place where the property may be found and there in the presence of two residents of the county declare that by virtue of the order he attaches the property at suit of plaintiff and shall then, with said residents, who shall be first sworn, make an appraisement, etc., are in order to prevent surreptitious liens and must be strictly pur-

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sued to obtain a valid levy. In that case the levy was made in the presence of the plaintiff and another resident. The sheriff called a disinterested appraiser but the statute was held to require a disinterested witness of the levy.

It must be admitted that in the present case there was no witness at all to any levy. The sheriff merely delivered his copy to the tenant and going on told the appraisers, when he got them together a mile or more away, that he had levied. The jurisdiction in this action depends upon the levy and the acquiring of a lien by it upon these premises. It is true that in *Connelly v. Edgerton, supra*, the appraisal by others than the witnesses of the levy is held to be a mere irregularity of which a third party could take no advantage. But this court in *Ames v. Parrott*, having held upon careful consideration, that not only a declaration, but a declaration in the presence of competent witnesses is necessary to a valid levy, we are constrained to hold that there was none in this case and no lien obtained.

The 4th and 5th objections against any decree for plaintiff seem to be well taken. The first conveyance of the land was to Brewer for an expressed consideration of \$1,500. This is alleged to have been without consideration. The allegation is denied. His deed to Mrs. Porter expressed \$1,600 as the consideration. This was also alleged to have been without consideration and the allegation was denied. If the transaction had been shown to have been actually between Porter and his wife as against Porter's creditors the burden would be upon her to show the consideration. With no proof of such a state of facts, and none appears in the record, the recitals in the deeds must be taken as true. There is nothing to impeach Brewer's good faith as a purchaser. In that character he could convey to Mrs. Porter or anyone else and give good title.

So as against the present owner, Wilcox, it was necessary to prove that the debt on which this judgment was founded antedated the conveyance. This was not done. A judg-

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ment as between strangers to it is only proof of its own existence. It does not establish any of the facts on which it must have been based except between the parties and their privies. 1 Freeman, Judgments [4th ed.], section 154.

The sixth objection, that the premises were, when conveyed to Brewer, the family homestead, is not made out by the evidence and would not, so far as it appears from this record, sustain the decree. For lack of a valid levy of the writ of attachment and for failure to prove that the conveyance to Brewer was merely for the purpose of getting the title to Mrs. Porter, and for lack of proof that the debt was incurred before the deed to Brewer, plaintiff failed to establish its case.

It is recommended that the decree of the district court be affirmed.

KIRKPATRICK and LOBINGIER, CC., concur.

AFFIRMED.

BENJAMIN V. KOHOUT ET AL., APPELLANTS, V. PARTHENIA
A. THOMAS ET AL., APPELLEES.

FILED JANUARY 21, 1903. No. 12,516.

Commissioner's opinion. Department No. 2.

Fraud: LIMITATION OF ACTIONS: APPLICABILITY TO REALTY. Section 12, of the Code of Civil Procedure, which bars actions for relief on the ground of fraud within four years from the discovery of the fraud, applies to actions based on fraud affecting the title to real estate as well as to actions affecting the title to personality.

APPEAL from the district court for Saline county. Tried below before STUBBS, J. *Affirmed.*

F. I. Foss, B. V. Kohout and R. D. Brown, for appellants.

A. S. Sands and Frank H. Woods, contra.

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OLDHAM, C.

June 6, 1901, plaintiffs filed a petition in the district court of Saline county, Nebraska, the material averments of which were that Aneliza Gunn departed this life in Saline county in the month of September, 1891; that Mary M. Hodges was duly appointed executrix of the last will and testament of said Aneliza Gunn, deceased; that September 5, 1891, "The defendant, Parthenia A. Thomas, in order to defraud the said Aneliza Gunn and her heirs, while the said Aneliza Gunn was sick and unable to do any act or to transact any business, and while she was so sick that she did not know anybody and did not know what she was about, the said Parthenia A. Thomas did pretend to have her sign a deed" to the lands in controversy, describing them, "for the nominal sum of \$1,900 expressed in said deed, and pretended to have said deed witnessed and acknowledged, witnessed by Doctors S. G. Panter and H. W. HeWitt, and acknowledged before S. S. Story, notary public, and on the said 5th day of September, 1891, which said pretended deed purports to convey said property to the said Parthenia A. Thomas. And the plaintiffs show to the court that said deed was a fraud and that said Parthenia A. Thomas knew it was a fraud and knew that she was committing a fraud in attempting to procure the same to be made and did so with the full knowledge that the said Aneliza Gunn was so sick that she did not know any one and was unable to comprehend what she was about and was unable to transact any business at all, in fact was unable to move in her bed, and the said Parthenia A. Thomas knew all of these facts, knew that the said Aneliza Gunn was on her deathbed, and did die within a few days thereafter, and thus attempted to defraud her, the said Aneliza Gunn and her heirs, out of the said property." The petition further alleges "that the said Parthenia A. Thomas never paid the said Aneliza Gunn nor her heirs anything for said property and procured the same by the fraud above set forth and entered

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into the possession of the said property with the full knowledge of said fraud and wrongs above stated," and "that the said Aneliza Gunn died within a few days thereafter the pretended execution of the deed and without ever having regained consciousness, and without ever having known that she had made said instrument or ratifying the same in any way, and without receiving anything therefor."

The petition then alleges that the defendant, Alexander McFarlane, pretended to buy said property from the said Parthenia A. Thomas, but that he was duly notified by the executrix of the last will of Aneliza Gunn that Parthenia A. Thomas did not have a good title to the premises and that her title had been procured by fraud; that after the death of Aneliza Gunn her will was duly filed for probate; that by the provisions of the will the lands in controversy were bequeathed to Charles O. Gunn and Effie M. Gunn; the provisions of this will making this bequest being set out in the petition. The petition further alleges that on April 25, 1901, the said Effie M. Gunn and her husband, Alfred W. Gunn, sold and conveyed all the interest of said Effie M. Gunn in two-thirds of the lands in controversy to plaintiff, Benjamin V. Kohout, who became and is now the legal owner of the two-thirds of the land described in the petition; that plaintiff Alfred W. Gunn is the legal owner and entitled to the possession of one-third of said lands. The petition further alleges that defendants, Parthenia A. Thomas, and Alexander McFarlane, have had possession of the premises since September 5, 1891, and have never accounted to plaintiff or any one else for their rental value. The petition then prays for an accounting that defendants be decreed to pay the rental value of said property from September 5, 1891; that the deed dated September 5, 1891, made by Aneliza Gunn to Parthenia A. Thomas be declared void and of no effect and that the conveyance from Parthenia A. Thomas to Alexander McFarlane be declared null and void and set aside; that the title to said property be quieted in the

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plaintiffs according to their respective shares and for all other equitable relief.

To this petition defendants interposed a demurrer alleging, (1) that the petition did not state facts sufficient to constitute a cause of action, and (2) that the cause of action set forth in the petition did not accrue nor arise within four years next preceding the commencement of this action. This demurrer was sustained by the trial court and, the plaintiffs refusing to plead further, their petition was dismissed and they now bring the action here by appeal.

An inspection of the petition, the material averments of which have been set out in the statement, discloses the fact that there is no allegation in the petition tending to toll the statute of limitation. It fairly appears from the petition that after the alleged fraudulent deed was procured by defendant Parthenia A. Thomas, she immediately took possession of the lands under her deed and that she and her grantee, McFarlane, have retained the possession ever since. Instead of the petition making any allegation that the fraud alleged to have been practiced, by defendant Parthenia A. Thomas in procuring the deed, was unknown to the heirs of Mrs. Gunn, the allegations tend to show that the executrix of the estate knew of this alleged fraud and informed defendant McFarlane of it before he purchased the lands from defendant Parthenia A. Thomas. The petition shows on its face that possession was taken under this deed nearly ten years before this cause of action was instituted; consequently the only question is: does section 12, Code of Civil Procedure, which provides a four years' bar for certain causes of action, and among them "an action for relief on the ground of fraud, but the cause of action in such case shall not [be] deemed to have accrued until the discovery of the fraud," bar this action?

It is contended by appellees that this section of the statute applies to fraudulent actions affecting title to personal property, and has no reference to conveyances

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affecting title to real estate. The trouble with this contention is, that it flies in the face of a long line of decisions of this court, which have held that this section of the statute does apply to fraudulent transfers of real estate as well as personal property. *Parker v. Kuhn*, 21 Neb., 413; *Hellman v. Davis*, 24 Neb., 793; *Wright v. Davis*, 28 Neb., 479; *Ainsfield v. More*, 30 Neb., 385; *Hughes v. Housel*, 33 Neb., 703; *Gillespie v. Cooper*, 36 Neb., 775; *Forsyth v. Easterday*, 63 Neb., 887. As this disposes of the case, it is not necessary to examine into the sufficiency of the petition aside from the statute of limitations.

It is therefore recommended that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

ISAAC CAHN, APPELLANT, v. FRANK E. ROMANDORF ET AL.,
APPELLEES.

FILED JANUARY 21, 1903. No. 12,528.

Commissioner's opinion. Department No. 1.

Mechanics' Liens: MORTGAGES: PRIORITIES: EVIDENCE. Evidence held to support the finding of the trial court that the contract under which materials were furnished was made, and a portion of such materials delivered, before the recording of plaintiff's mortgage, and to sustain the decree.

APPEAL from the district court for Lancaster county.
Tried below before CORNISH, J. *Affirmed.*

Allen W. Field and Guy A. Andrews, for appellant.

Wilmer B. Comstock, contra.

HASTINGS, C.

This is a suit brought by the plaintiff Cahn, to foreclose a mortgage upon ten acres of land in the outskirts of the city of Lincoln. The mortgage was given to secure the

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purchase price of the land, \$3,000. The land was sold in February by Cahn to the defendant Romandorf, for a cash payment of \$25 and an agreement that a mill building should be removed to and placed upon the land in condition to operate. The remainder of the purchase price was to be in payments of \$150 every six months. In the placing of the mill on the premises and putting it in condition to operate something over \$2,000 were expended. The defendant Michener, furnished the greater part of the material for this work. He set up by cross-petition a mechanic's lien for \$810 and interest. The district court allowed him a first lien for the amount of his account. This was excepted to by the plaintiff and that part of the decree is appealed from.

The sole question presented is the relative priority of plaintiff's mortgage and Michener's lien. Michener's priority is claimed on two grounds. 1st. That the contract was made and a part of the material furnished by Michener to Romandorf before the filing of the mortgage. 2d. That the sale of the premises by Cahn to Romandorf, and the mortgage back, are all part of the same transaction which contemplated and provided for the use of these materials for the improvement of the property and Cahn's interest therefore subject to the lien. The second ground hardly appears in the pleadings. And if it does it is by reason of Cahn's reply to Michener's answer and cross-petition. There appears in the record leave to amend both the reply and the answer at the time of the trial. The reply was amended but the answer appears not to have been, although leave was taken to set up the nature of Cahn's interest in the premises and its consequent subjection to Michener's lien. It was not actually pleaded. The only question necessary to be considered seems to be whether or not plaintiff is correct in claiming that there is nothing to show that any part of these materials were furnished prior to the filing of the mortgage.

The mortgage bears date of April 1, and was filed April 6. The agreement under which the materials were fur-

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nished by Michener was made in the latter part of February or the first of March. Michener testifies that he can only give the exact dates of the furnishing of these materials by means of his books; that he knows on the dates indicated the materials were sent over; that he asked Romandorf whether or not they had been received and was informed that they had. The account shows only a few items of sand and lime, five in number and amounting to \$13.15 furnished before April 6; the remainder was furnished during the following months, the last as late as September 15. Some materials had been furnished by Michener to Romandorf before this agreement under which the account was made and had been paid for.

It is clear that the agreement to furnish the material antedated the mortgage. Michener's testimony is that he commenced to furnish the material immediately; that Romandorf was anxious to get it at once and that there was some difficulty owing to the state of the roads in getting it to him. Michener testifies that the date in the books is the date on which it was sent out. Romandorf says that he is unable to give the dates upon which it was received, but he is sure that some of the material was received before the signing of the notes and mortgage on April 1. That he had the account submitted to him at the time of furnishing the material and found it correct.

The appellant claims that the testimony is no better than that which this court held to be insufficient in *Henry & Coatsworth Co. v. McCurdy*, 36 Neb., 863. An examination of that case, however, will show that the witness on whose testimony alone the case rested, disclaimed all personal knowledge of the delivery of any of the materials for use on the premises upon which the lien was claimed, and he admitted on cross-examination that he did not himself keep the books and had no personal knowledge of the things stated in them. The statements of the witness, instead of being corroborated by the purchaser of the lumber, as in the present case, were denied by him. There seems to be no doubt of the soundness of the court's

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conclusion in that case, that the testimony was only hearsay and could not be considered, but in the present case the witness was testifying to personal knowledge of the sending of the lumber, testifying to admissions by the purchaser, and the purchaser himself was corroborating him, but could not give exact dates, but does state that some of the material was furnished before the mortgage was executed. It seems to be conceded that if this was the case, the decree is right. *Goodwin v. Cunningham*, 54 Neb., 11; *Chapman v. Brewer*, 43 Neb., 890; *Henry & Coatsworth Co. v. Fisher*, 37 Neb., 207.

It is believed that there was sufficient evidence to sustain the decree of the district court and its affirmance is recommended.

KIRKPATRICK and LOBINGIER, CC., concur.

AFFIRMED.

THE COUNTY OF SARPY v. AUGUSTUS W. CLARKE.

FILED JANUARY 21, 1903. No. 12,532.

Commissioner's opinion. Department No. 3.

1. **Taxation: EQUALIZATION: PLEADING.** In a complaint filed before a board of equalization by one aggrieved by the excessive valuation of his land, it is not necessary to allege that other lands in the precinct have been assessed too low.
2. **Taxation: EQUALIZATION: PLEADING.** It is not necessary that such complaint be drawn with the precision of a pleading in a court of record; it is sufficient if it shows that the complainant considers himself aggrieved and that his property has been assessed too high.
3. **Taxation: EQUALIZATION: DENIAL OF RELIEF: REDUCTION OF AGGREGATE ASSESSMENT.** A board of equalization should not deny relief in a case of that kind on the ground that to lower the assessment of a complainant would reduce the aggregate assessment.
4. **Taxation: EQUALIZATION: CONSTITUTIONAL LAW: CONSTRUCTION.** Section 4, article 9 of the constitution, has no reference to such changes in an assessment as may be necessary to a just and fair equalization.

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5. **Taxation: EQUALIZATION: QUESTION INVOLVED IN PLEADING.** The question presented by a complaint that the property of the complainant has been assessed too high is not whether it has been assessed above its fair value, but whether the valuation placed upon it bears a just relation to that placed upon other property of its kind in the precinct.
6. **Taxation: EQUALIZATION: APPEAL AND ERROR: REVERSAL: DUTY OF DISTRICT COURT.** Where error is prosecuted to the district court from an order of the board of equalization by the complainant, and such order is reversed, the district court may order the board to reconvene for the purpose of hearing the complaint.

ERROR from the district court for Sarpy county. Tried below before BAKER, J. *Affirmed.*

William R. Patrick, County Attorney, for plaintiff in error.

H. Z. Wedgwood, contra.

ALBERT, C.

A. W. Clarke filed a complaint before the board of equalization of Sarpy county, alleging, in effect, that he was the owner of certain described lands in that county; that the same was of inferior quality and largely unproductive, and that it had been assessed at \$8 per acre, which was the same rate at which many of the best and most productive lands in the precinct, worth from two to three times as much as his, had been assessed, and asking a reduction of his assessment. On the hearing he introduced evidence as to the value of his land and the rate at which it had been assessed. He then undertook to show that other land in the same precinct, worth upwards from two to three times as much as his, had been assessed at the same rate. This evidence was excluded on the ground that there was no complaint that any other land had been assessed too low. The board refused to reduce his assessment, and dismissed his complaint. He preserved the record and prosecuted error to the district court where the order of the board of equalization was reversed and an order entered

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requiring the board of equalization to reconvene and hear the complaint. From the judgment of the district court, the county prosecutes error to this court.

The theory upon which the evidence offered by the complainant was excluded, and his complaint dismissed, appears from the following excerpt, taken from the well prepared brief of the plaintiff in error:

"Before an individual who claims to be aggrieved by the excessive valuation of his lands can obtain relief he must show by proper complaint that his lands are not only valued too high, but that the valuations placed upon other particular lands are too low. This is obvious, not only by reason of the statute in relation to the equalization of taxes, but because of the constitutional inhibition against the commutation or release of taxes."

The constitutional provision cited in support of this theory, is section 4, article 9, which is as follows:

"The legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever."

That the provision quoted has no application to the present case seems obvious. The grievance of the complainant is that his property had been assessed too high. If that be true, then, assuming that the other property in the district had been assessed at its fair value, it follows that not only is his assessment too high, but that, to the extent that his assessment is excessive, the assessment of the entire precinct is also excessive. Therefore, to reduce his assessment so that it would bear a just relation to the assessment of other property in the precinct, could not be said to operate as a release or discharge of the complainant from his proportionate share of the taxes to be levied, nor as a release of the precinct in that behalf. It would simply be reducing their assessments so that they would

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be required to pay a proportionate share of the taxes to be levied, and no more. Besides, we do not consider the section has any references to such changes in an assessment as may be necessary to a just and fair equalization.

The statutory provision, cited in support of the theory of the plaintiff in error, is the third subdivision of section 70, article 1, chapter 77, of the Compiled Statutes. The entire section, so far as is material at present, is as follows:

*“Second—*On the application of any person considering himself aggrieved or who shall complain that the property of another is assessed too low, they shall review the assessment and correct the same as shall appear to be just. No complaint that another is assessed too low shall be acted upon until the person assessed, or his agent, shall be notified of such complaint, if a resident of the county; *provided*, That in the counties under township organization [such application] shall have been made to the town board of equalization, and been rejected by them. *Third—*It shall ascertain whether the valuation in one township, precinct, or district bear just relation to all townships, precincts or districts in the county; and may increase or diminish the aggregate valuation of property in any township, precinct or district, by adding or deducting such sum upon the hundred as may be necessary to produce a just relation between all the valuations of property in the county, but shall in no instance reduce the aggregate valuation of all the townships, precincts or districts below the aggregate valuation thereof as made by the assessors; neither shall it increase the aggregate valuation of all townships, precincts or districts except in such amount as may be actually necessary and incidental to a proper and just equalization. It may consider lands, village or city lots, and personal property (except property assessed and valued by the state board of equalization) separately and determine a separate rate per cent. of addition or reduction for each of said classes of property as may be necessary to a just equalization thereof.”

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It will be observed that, by the provisions of subdivision two, the complaint of one considering himself aggrieved, that is, one considering that his property has been assessed too high, may be heard and disposed of without notice, whereas, a complaint that another has been assessed too low, can be heard and disposed of only after notice to the owner of the property thus assessed, if a resident of the county. These provisions are absolutely irreconcilable with the theory advanced, that the complaint of one aggrieved by an excessive assessment of his property is insufficient, unless it specify some other property assessed too low in order that the assessment of the latter may be so raised that the reduction of the former would not reduce the aggregate assessment. Moreover, the theory is based on the assumption that the reduction of the assessment of a particular piece of property must necessarily and irrevocably result in a reduction of the aggregate assessment of the entire county. The assumption is unfounded, even were we to assume that the third subdivision of the section is to be taken in its literal and mathematical sense, and that it applies to the equalization of individual assessments. Under that subdivision, the board has power to raise the aggregate valuation so far as may be necessary and incidental to a proper and just equalization. That being true, if doing justice to the complainant should result in lowering the aggregate assessment, it may still be raised to its former amount by the exercise of the powers conferred by that subdivision. It is true that the complaint was not drawn with that precision with which a pleading in a court of record should be drawn; neither is it necessary that it should be; a taxpayer should not be required to employ one skilled in pleading in matters of this kind. It challenged the attention of the board to the fact that the complainant considered himself aggrieved in that his property had been assessed too high. That was sufficient, and the board should have heard his complaint and received the evidence offered in support of it.

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It is next urged that the complainant was not entitled to a reduction of his assessment because the evidence shows that it was in fact assessed at less than one-third its actual value. The question presented by a complaint of this kind is not whether the property of the complainant has been assessed at its fair value, but whether its assessment bears a just relation to the assessment of other property of the same kind in the precinct. *State v. Osborn*, 60 Neb., 415. While it is true that the evidence shows the land of the complainant was assessed at about one-third its actual value, he offered to prove that other land in the precinct was assessed at about one-eighth of its actual value. In other words, he offered to show that his assessment was relatively excessive. This he had a right to do, and the district court rightly held, that the refusal of the board to permit him to show this was reversible error.

It is next urged that the district court erred in entering an order requiring the board of equalization to reconvene and hear the complaint. The district court is a court of common-law jurisdiction and, as such, has supervision over inferior courts and tribunals. The abolition by statute, of the writ of *certiorari*, was not intended to curtail the jurisdiction of the district court in this behalf, nor to deprive a litigant of the relief theretofore afforded by that writ. Had the proceedings been by *certiorari*, it had been perfectly competent for the district court to make the order in question. We are unable to see why the order would not be proper when the relief sought is by petition in error. It is true, the county board, as such, is not a party to the record, but it is the governing body of the county and is chargeable with notice of proceedings of this character, brought to review its orders. We think the order was proper, especially since it enjoined on the board merely what the law would have enjoined upon it had the order not been made.

We discover no error in the record and therefore rec-

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ommend that the judgment of the district court be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

H. L. COOK ET AL. V. N. J. PAUL ET AL.

FILED JANUARY 21, 1903. No. 12,535.

Commissioner's opinion. Department No. 1.

Party Walls: COVENANT FOR COMPENSATION: RUNNING WITH LAND. A promise by an adjoining lot-owner to the builder of a party wall to compensate him for the use thereof is personal to the promisee and not a covenant running with his land, and where the builder's lot is conveyed to one party and the party wall agreement assigned to another, the latter is entitled to the sum due under such agreement.

ERROR from the district court for Howard county. Tried below before THOMPSON, J. *Affirmed.*

T. T. Bell and Doyle & Berge, for plaintiffs in error.

J. A. Haggart and A. A. Kendall, contra.

LOBINGIER, C.

On March 17, 1892, defendant in error Enevoldsen, and A. G. Kendall, who were the owners of adjoining lots in the city of St. Paul, entered into a party wall agreement by which it was arranged that the former who was about to erect a building on his lot might construct one-half of the party wall upon the land of the latter. The contract also contained the following provisions:

"In consideration of the above agreements to be performed by the party of the first part, the party of the second part promises and agrees that when he shall build a brick building upon his land lying north of said wall and connecting it with said wall, and hereby using said wall for one side of his building, he will pay the party of

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the first part \$10 per thousand for all brick laid in the north one-half of said wall erected by the party of the first part as aforesaid. This agreement shall be binding upon the heirs, assigns, executors and administrators of the parties hereto."

This contract was afterward assigned to defendant in error Paul, as collateral security, while the lot and building passed by *mcsne* conveyances to plaintiffs in error. Kendall's lot was sold to defendant in error Taylor, who also erected a building thereon, utilizing the party wall and using 23,000 brick, which under the contract called for the payment of \$230. This sum was claimed by Paul as the assignee of the contract and also by plaintiffs in error as the owners of the Enevoldsen lot, and the former, together with Enevoldsen, have brought this action against plaintiffs in error and Taylor. The latter, at no time denying liability, interpleaded and deposited the money in court. The cause was submitted on the pleadings and a stipulation of facts, and, being tried without a jury, the court found that the contract above mentioned "was personal in its character and was not a covenant running with the land" and rendered judgment in favor of plaintiffs below.

The petition in error prosecuted from this judgment presents the single question of law whether such a contract is personal so as to entitle the assignee to the amount due under its terms or whether it created an interest in the land which plaintiffs in error acquired by the conveyance to them so that they are entitled to the proceeds. The question is a new one in this state, for *Barr v. Lamas-ter*, 30 Neb., 688, cited by plaintiffs in error, decides no more than that such a contract constitutes an incumbrance within the terms of a warranty. It is also an important question and one upon which, as Mr. Freeman observes in his note to *Bloch v. Isham*, 92 Am. Dec. [Ind.], 301, "great learning and research have been spent." As a rule of property as well as of contract, forming an essential part of the law whose foundations we are laying

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in this comparatively new state, it is entitled to the most careful consideration and we shall endeavor to settle it in accordance with the weight of judicial opinion, at the risk of a seemingly prolonged review of the authorities.

The question appears to have arisen in this country first in Pennsylvania, where it was held that the right to reimbursement for the use of a party wall was personal to the first builder and did not pass by his grant of the land. *Todd v. Stokes*, 10 Pa. St., 155; *Hart v. Kucher*, 5 S. & R. [Pa.], 1; *Ingles v. Brighthurst*, 1 Dall. [Pa.], 341. It is true that these decisions were rendered after the passage of a colonial statute which required the reimbursement of the first builder. But this act merely took the place of the contract in the case at bar as the source of the second builder's liability. It in no way touched upon the nature of that liability so as to determine whether it was merely personal to the first builder or created an interest in his land. As was said in *Bloch v. Isham*, 28 Ind., 37, "There is nothing in this statute which is not embraced in the agreement of the parties in this case." See, also, *Gibson v. Holden*, 115 Ill., at page 211; *Cole v. Hughes*, 54 N. Y., at page 447. However, in 1849, after the Pennsylvania cases above referred to were decided, and evidently to destroy their effect, a statute was passed which provided, "that, in all conveyances of houses and buildings, the right to compensation for the party wall built therewith shall be taken to have passed to the purchaser, unless otherwise expressed." It seems, therefore, that a statute was considered necessary to enact into law the rule contended for by plaintiffs in error in the case at bar. *Dannaker v. Riley*, 14 Pa. St., 435; *Knight v. Beenken*, 30 Pa. St., 372; *Voight v. Wallace*, 179 Pa. St., at page 525. The doctrine that a covenant like that contained in this contract is a mere personal one not running with the land, has also been adopted in Indiana: *Bloch v. Isham*, 28 Ind., 37, 92 Am. Dec., 301; *Conduitt v. Ross*, 102 Ind., 166; West Virginia: *List v. Hornbrook*, 2 W. Va., 340; *Parsons v. Baltimore Building & Loan As-*

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sociation, 44 W. Va., at page 341; Colorado: *Crater v. McCormick*, 4 Colo., 196; Illinois: *Gibson v. Holden*, 115 Ill., 199, qualifying *Roche v. Ullman*, 104 Ill., 18; *Behrens v. Hoxie*, 26 Ill. App., 417; Missouri: *Huling v. Chester*, 19 Mo. App., 607, and Ontario: *Kenny v. Mackenzie*, 12 Ont. App., 346. It is true that in Illinois a qualification was sought to be made in *Tomblin v. Fish*, 18 Ill. App., 439, but in view of the supreme court's decision and of the fact that the case last cited was decided by an inferior court, we can hardly accept it as an authoritative statement of the law of Illinois. Plaintiffs in error concede that *Bloch v. Isham*, 28 Ind., 37, and *Gibson v. Holden*, 115 Ill., 199 are adverse to their contention, but claim that these are exceptions to the general rule. Without now passing upon the question of the weight of authority it may be well to point out that both of these cases were cited with approval and followed by this court on another point, in *Shiverick v. Gunning Co.*, 58 Neb., at page 33.

Some of the earlier New York cases decided by inferior courts lay down a rule in conflict with those just reviewed. *Weyman's Executors v. Ringold*, 1 Bradf. [N. Y.], 40; *Burlock v. Peck*, 2 Duer [N. Y.], 90; *Keteltas v. Penfold*, 4 E. D. Smith [N. Y.], 122; *Brown v. McKee*, 57 N. Y., 684. But in the leading case of *Cole v. Hughes*, 54 N. Y., 444, these decisions were in effect overruled and the court adopted the Pennsylvania doctrine which has ever since prevailed in New York. *Sebald v. Mulholland*, 155 N. Y., at page 461; *Hart v. Lyon*, 90 N. Y., 663; *Scott v. McMillan*, 76 N. Y., 141; *Duer v. Fox*, 29 Misc. [N. Y.], 81.

The Massachusetts decisions have been the source of some misapprehension as regards the point here involved. *Weld v. Nichols*, 17 Pick. [Mass.], 538, decided that a grantor's liability to pay for the use of a party wall was a personal one and not within the terms of his warranty. In *Savage v. Mason*, 3 Cush. [Mass.], 500, cited by plaintiff in error, the agreement expressly provided that the covenant for payment for the use of the party wall should run with the land, and the court held that the intention of the parties in this regard was "express and clear." In

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Maine v. Cumston, 98 Mass., 317, the party wall agreement was contained in the deed conveying the land. But in *Joy v. Boston Penny Savings Bank*, 115 Mass., 60, it was held that no interest in the land passed by virtue of a contract like this which was not under seal. The court there says, "The contract was merely a personal one with Currier" (the first builder). See also *Jenkins v. Spooner*, 5 Cush. [Mass.], 419. In *King v. Wight*, 155 Mass., 444, the question is treated as one to be determined according to the intent of the parties, and stress is laid on the fact that the contract is under seal, acknowledged and recorded. In *Lincoln v. Burrage*, 177 Mass., 378, which is the latest announcement of that court which we have been able to find on the question, it is held, Holmes, C. J., writing the opinion, that a covenant in a deed by which the grantee agrees to pay for the use of a party wall does not run with the land nor bind a subsequent grantee thereof. The question is the reverse of the one here presented. But if the liability of the second builder is personal and not binding on his grantees in the absence of an express agreement, we are unable to see why the right of the first builder should not also be personal, or why it should pass to the grantees of his land without a corresponding stipulation. On the whole we do not think that the authority of the Massachusetts court can be claimed for the doctrine championed by plaintiffs in error under the facts of this case.

In *Thompson v. Curtis*, 28 Ia., 229, it was decided that a covenant like this is one which runs with the land. But this decision is based entirely on a statute borrowed from the Louisiana code which embodied the doctrine of the civil law providing that a lot owner might construct a party wall on his neighbor's lot but could not compel the latter to contribute to the expense thereof. The court professes to follow certain Louisiana decisions which were evidently not examined and are not in point, and also the New York doctrine which, as we have seen, has been repudiated in that jurisdiction.

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In *Platt v. Eggleston*, 20 Ohio St., 414, also cited by plaintiffs in error, the court likewise follows the overruled New York cases, but seeks to distinguish *Bloch v. Isham*, 28 Ind., 37, because the promise of compensation there was not made to the "assigns" of the first builder. An examination of the contract in the case at bar will show that it resembles the Indiana case and not the Ohio decision last cited, for the promise here is merely to "pay the party of the first part." It is true that the agreement is made "binding upon the heirs, assigns," etc., and there is no express provision that the sum due shall be payable to the assigns. In *Adams v. Noble*, 120 Mich., 545, the court reviews a portion of the authorities and concedes that they are "difficult to harmonize," but says that they may be divided into two classes, the second class holding that the covenants run with the land, and pass to the purchaser or assignee, when the contract evinces such intention, and where the language used is between the parties and their assigns. As the sum due under the party wall agreement was there made expressly payable to the first builder "or assigns," the court held that the case belonged to this second class.

Some Minnesota cases are relied on by plaintiffs in error. In *Pillsbury v. Morris*, 54 Minn., 492, a contract substantially identical with this was construed and commented on as follows:

"It was agreed that Steele or his assigns should pay to Small the value of one-half of the wall whenever he (Steele) or his assigns should use the same. This covenant was personal to Small, as much so as if Steele had made the covenant with the contractor who built the wall to pay for his half at some future time. The right of action remained in Small, notwithstanding the transfer of the leasehold interest, and passed by assignment to the plaintiff."

In *Kimm v. Griffin*, 67 Minn., 25, the court announces a different doctrine and seeks to distinguish the case last cited on the ground that the first builder, when he leased

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his interest, reserved his rights in the party wall agreement. It will be seen, however, that the opinion in that case does not rest upon the fact of such reservation, but upon the ground that the "covenant was personal" to the first builder. In *National Life Ins. Co. v. Lee*, 75 Minn., 157, 77 N. W. Rep., 794, the agreement is express, as in the Ohio and Michigan cases above cited, to pay the first builder, "his heirs or assigns." Moreover, the only case cited in the opinion is *Kimm v. Griffin*, 67 Minn., 25, which refers only to the Ohio and some of the Massachusetts cases and ignores the other authorities above reviewed. We cannot accept the statement there made, "that it is settled by the great weight of authority that the covenants of the party-wall contracts, like the one under consideration, do run with the land and that all their benefits and burdens, the liability to perform and the right to take advantage of them—both pass to the heir or assignee of the land to which the covenant is attached." On the contrary, as we have seen, a considerable majority of the courts which have passed upon this question, as well, in our view, as a preponderance of the well considered cases, adhere to the contrary doctrine. We think, therefore, that the more accurate statement of the law is still the one announced by the learned editor of the *American Decisions* (Mr. Freeman) in volume 92, page 301, of that series, as follows:

"The majority of the authorities maintain that these covenants are not of the nature of covenants running with the land, and that the grantees of the original parties can not, by reason of their holding adjoining lots, take advantage of the benefit, or be subjected to the burden of the covenant to pay for one-half of a party wall, but that the right of recovery is personal to the builder, and the obligation to pay, except in certain cases, rests upon the covenantor only; and an agreement of the parties that the covenant shall be binding upon their heirs or assigns, etc., or even that it shall run with the land, is ineffectual."

We have not thought it necessary to follow counsel in

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their discussion of the wisdom or policy of the rule or to enter into the numerous collateral questions as to what covenants will and what ones will not run with the land. We have treated the specific point here in controversy as one to be settled by authority and we are satisfied that by the great weight of precedent such a contract as this is personal. We therefore recommend that the judgment be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

ALEXANDER N. BAKER V. THE GRAND ISLAND BANKING
COMPANY ET AL.

FILED JANUARY 21, 1903. No. 12,549.

Commissioner's opinion. Department No. 2.

1. **Taxation: HOMESTEAD CLAIMANT IN POSSESSION: LIENS, JUDGMENT AND ATTACHMENT, AGAINST SURPLUS.** The rule that the holder of a limited or partial interest must pay taxes while in possession, as between himself and the remainderman, does not apply to a homestead claimant in possession of a tract worth more than \$2,000, but not divisible, pending proceedings to establish the priority of judgment and attachment liens on the surplus.
2. **Homestead Claimant: INCUMBRANCES, DEDUCTION OF: SUBSEQUENT LIEN-HOLDERS: TAXATION.** As to subsequent lien-holders, such homestead claimant is entitled to \$2,000 of the proceeds without deduction of incumbrances, and the lien-holders can get no greater right by neglecting to pay taxes for the protection of their liens than if they had paid them.
3. **Homestead Claimant: LIEN-HOLDER, SON AS: MORTGAGEE IN POSSESSION: TAXATION.** A lien-holder living in the family of a homestead claimant who is in possession of the property as a homestead, is not to be deemed a mortgagee in possession, accountable for rents and profits or liable to pay taxes as such.

ERROR from the district court for Hall county. Tried below before THOMPSON, J. *Reversed with directions.*

W. H. Thompson, for plaintiff in error.

Charles G. Ryan, contra.

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POUND, C.

The property in question consists of two town lots with a house, barn, and other improvements, found to be worth \$6,500. It is the homestead of Alexander H. Baker, and the court has found that it cannot be divided. In a suit by creditors to establish certain judgment and attachment liens upon the surplus, it was found that Alexander N. Baker, son of the homestead claimant, had a lien of \$2,200 upon the surplus, and third and fourth liens were awarded to the Grand Island Banking Company and Edgar M. Westervelt, as receiver of the Citizens National Bank, respectively. The attachment of the Grand Island Banking Company was sued out in December, 1893, and from that time until December, 1901, over a thousand dollars of taxes accumulated. Accordingly, after sale, the Grand Island Banking Company filed a supplemental petition setting up that the Bakers had occupied the premises during said period, deriving the benefit thereof; that the rental value had exceeded the taxes, and praying that the taxes be charged against their interests in the proceeds. The court held that the taxes prior to the decree in the creditors' suit had been adjudicated therein, but apportioned the taxes subsequent thereto, which had accumulated pending appeal in a contest over priority between the third and fourth lien-holders, among the several parties interested in the proceeds, charging them to Alexander H. Baker in proportion to his homestead interest and to Alexander N. Baker in proportion to the amount of his lien. Error is prosecuted from this order by each of the Bakers.

We think a mere statement of the facts sufficient to show that the order can not be suffered to stand. Counsel makes an able and plausible argument based upon the principles governing life-tenants and remaindermen. But, in our opinion, the rule that the holder of a limited or partial interest must pay taxes while in possession, as between himself and the remainderman, does not apply

to a homestead claimant in possession of a tract worth more than \$2,000, but not divisible, pending proceedings to establish the priority of judgment and attachment liens on the surplus. The homestead claimant was entitled to his homestead or else to the \$2,000 in lieu thereof. During the long period in which priority of liens on the surplus was in litigation, he held the homestead because the sale was delayed and his money was not forthcoming. Had a sale been made at once, he might have had his money and the surplus might have been held pending the litigation as to priorities. His position was very different from that of an ordinary occupant of land. Even if the liens had been mortgages, superior to the homestead right, so long, at least, as the property was so situated that any possession required possession and use of the whole, he could not have been compelled to apply rents and profits for the benefit and protection of the liens. In such a case there are no rents and profits of a homestead, and a receiver will not be appointed. *Laune v. Hauser*, 58 Neb., 663; *Chadron Loan & Building Association v. Smith*, 58 Neb., 469. If the lien-holders had paid the taxes for the protection of their liens, they might have been entitled to a charge upon the property for the amount paid; and if the liens had been prior to the homestead right, the charge for taxes paid might have taken priority also. But, in such a case, if the liens were inferior to the homestead right, payment of taxes for their protection could not give them priority *pro tanto*. If the taxes were first deducted, the homestead claimant would still be entitled to receive \$2 000 of the proceeds before the lien-holders received anything on their liens. *Prugh v. Portsmouth Savings Bank*, 48 Neb., 414; *Corey v. Plummer, Perry & Co.*, 48 Neb., 481; *Hoy v. Anderson*, 39 Neb., 336. He is entitled to receive that sum without deduction of incumbrances, so far as subsequent lien-holders are concerned. Obviously the latter can get no greater right by neglecting to pay taxes for the protection of their liens than if they had paid them. Several cases

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have been cited from jurisdictions where the courts appoint receivers of homestead property. We need hardly say that they have no application under the statutes and adjudications in this state.

As to Alexander N. Baker, if he had been in possession under his lien, he would have been liable, undoubtedly, to apply the rents and profits to payment of taxes and the reduction of his claim. But under the circumstances there were no rents and profits to apply. The property was his father's homestead. His father was in possession of it as such. He lived with his father in his father's house. Surely a lien-holder living in the family of a homestead claimant who is in possession of the property as a homestead, is not to be deemed a mortgagee in possession, accountable for rents and profits or liable to pay taxes as such.

We recommend that the order be reversed and the cause remanded with directions to enter an order in conformity with the foregoing opinion.

BARNES and OLDHAM, CO., concur.

The order of the district court is reversed and the cause remanded with directions to enter an order in conformity with said opinion.

REVERSED WITH DIRECTIONS.

**HENRY HARTWICK, APPELLEE, v. JOHN WOODS ET AL,
APPELLEES, IMPLAINED WITH ALBERT BAHR ET AL,
APPELLANTS.**

FILED JANUARY 21, 1903. No. 12,550.

Commissioner's opinion. Department No. 3.

Mortgages: FORECLOSURE: APPRAISAL: OBJECTIONS. Objections made to an appraisement and sale of real estate under a decree of foreclosure examined, and held to show no valid objections to the same.

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APPEAL from the district court for Seward county.
Tried below before SORNBORGER, J. *Affirmed.*

D. C. McKillip, for appellants.

Norval Bros., contra.

DUFFIE, C.

This is an appeal from an order confirming a sale of real estate made under a decree foreclosing a mortgage. The first objection urged, viz., that the appraisers did not go upon the premises and view the property in making the appraisement, is wholly unsupported by any evidence. The only affidavit directed to that point clearly refers to an appraisement made by other parties and at an earlier date than the one under which the sale was made. The second objection, that the premises were not appraised in the smallest governmental subdivisions, does not, under the former holdings of this court, entitle the appellants to a reversal. *Smith Brothers Loan & Trust Co. v. Weiss*, 56 Neb., 210.

The third objection, that the appraisement fixed too low a valuation upon the land, can not be sustained. The evidence was conflicting and the finding of the lower court will not be interfered with. An objection to the sale is urged on the ground that the land was not offered in the smallest governmental subdivisions. It is sufficient to say that no such objection was made to the district court, and the objection cannot be first urged in this court; but further than this we cannot say from the record before us whether the sheriff offered the land in the smallest governmental subdivisions or not. It does appear that a sale of the whole quarter section was made, but it may be that the land was first offered in forty-acre tracts for which there was no bid. Under the holding in *Michigan Mutual Life Ins. Co. v. Richter*, 58 Neb., 463, it can not be urged as reversible error that the whole tract was offered and sold together.

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The county clerk in certifying liens against the land included the two mortgages foreclosed in this suit. Objection to the sale was made on this account. The appraisers very properly refused to consider or deduct these liens, knowing, as would any bidder at the sale, that the liens certified by the clerk were the identical liens for which the land was being offered.

We do not discover any reversible error in the record and therefore recommend the affirmance of the order appealed from.

AMES and ALBERT, CC., concur.

AFFIRMED.

THE TABLET & TICKET COMPANY V. HENRY LE FEBER.

FILED JANUARY 21, 1903. No. 12,561.

Commissioner's opinion. Department No. 3.

Pleading: CONTEMPORANEOUS CONTRACT: DEMURRER. An answer which sets forth a contemporaneous agreement varying the terms of a written contract which is the subject of the suit, but from which it does not appear, either expressly or by necessary intendment, that such agreement was oral, is not obnoxious to a general demurrer.

ERROR from the district court for Nuckolls county. Tried below before STUBBS, J. *Affirmed.*

Hammond & Williams, for plaintiff in error.

F. H. Stubbs, contra.

AMES, C.

This is an action to recover from the defendant upon certain written contracts set out in the petition. The contracts are in the form of written orders signed by the defendant, and reciting that the plaintiff had sold him a certain number of "gilt labels" having thereon certain words and devices in conformity to a sketch, apparently

drawn upon the order. There is no further description of the devices which are the subject of the contracts, whether as to material of which they were to be composed, or of the manner of their construction, or of the uses to which they were to be adapted. It is manifest therefore upon the face of the orders that the description given by them of the articles sold is incomplete. The petition supplies the defect, in part, by describing them as "bottle labels" and as to some but not all of them, it may be inferred from the drawings that they were designed to be affixed to bottles containing liquids. The answer goes further and alleges that the agreement between the parties was that the labels should be "varnished upon the face side thereof and gummed on the back; and the plaintiff warranted that said labels would be so varnished and gummed, that said labels after being placed on bottles would endure and remain there in good condition during all the time and throughout not less than three washings of said bottles." The answer further alleged a non-compliance with these requirements and a return of the labels because of it and denied liability. A demurrer to the answer was overruled and the plaintiff electing to stand upon it, judgment was rendered accordingly, to reverse which this proceeding is prosecuted.

The contention of the plaintiff in error is that the matter contained in the answer purported to vary the terms of a written contract by proof of a contemporary oral agreement and was therefore incompetent and insufficient as a defense. We think there are two answers to this objection: first, the answer does not aver that the alleged agreed description of the articles or the contemporary agreement was oral. Had the trial proceeded the court can not know that the defendant would not have offered written evidence in support of the allegations of his answer; and second, the written agreement exhibited by the plaintiff was, as already noted, manifestly incomplete, so that extraneous evidence, either written or oral, was, in case of a dispute, absolutely indispensable to the ascer-

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tainment of the exact description of the articles contracted to be sold. It is, however, unnecessary to decide this latter point. The answer, if true, stated a good defense to the action. Whether its truth could have been established by competent evidence the court was not called upon to decide. If the plaintiff had desired a more explicit statement of the agreement set out in the answer, he should have applied for it by motion.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

JOHN BOSSERMAN V. LAWRENCE LARSON

FILED JANUARY 21, 1903. No. 12,562.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: ASSIGNMENTS: MUST BE SPECIFIC.** Errors of law, to be available to the party complaining, must be specifically assigned in the petition in error.
2. **Appeal and Error: ASSIGNMENTS: TOO GENERAL.** An assignment of error that the judgment is contrary to law is too vague and indefinite to present any question for consideration in the supreme court.

ERROR from the district court for Nuckolls county. Tried below before STUBBS, J. *Affirmed.*

W. F. Bucks and Hammond & Williams, for plaintiff in error.

F. H. Stubbs, contra.

KIRKPATRICK, C.

This is an action brought by Lawrence Larson, defendant in error, against John Bosserman, plaintiff in error, to recover the sum of \$27.80, on an order given to defendant in error by one W. S. Edgar, upon plaintiff in error, which was duly accepted by the latter. After the acceptance of the order and before payment, plaintiff in

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error was served with garnishment process in an action against Edgar, who had given the order. Trial was had resulting in a judgment in favor of defendant in error, to reverse which the cause is brought to this court upon error. The assignments in the motion for a new trial are in the language following: "1st, that the judgment is contrary to law; 2d, the judgment is not sustained by sufficient evidence." The assignments in the petition in error are as follows: "1st. The court erred in rendering judgment for plaintiff; 2d. The court erred in overruling the motion for a new trial." In the argument of the cause in this court, no question is presented except the question of the sufficiency of the evidence, and as will be noticed, this alleged error is not assigned in the petition in error. It, therefore, can not be considered. The only assignment which is presented in both the motion for a new trial and the petition in error is that the judgment is contrary to law. Regarding this assignment it may be said, first, that as it has not been urged in arguments or briefs, it will be deemed waived. In the second place, it is so indefinite as not to present any question for review in this court. This has been repeatedly held: *Moore v. Hubbard*, 45 Neb., 612; *Bennett v. McDonald*, 59 Neb., 234; *Baer v. State*, 59 Neb., 655; *Quinn v. Moss*, 45 Neb., 614.

In *Lowrie v. France*, 7 Neb., 191, LAKE, J., discussing an assignment like that under consideration, said: "Several errors are assigned, the first of which is, that 'The court erred in rendering judgment for the plaintiff in the said action.' As an assignment of error this is altogether too general to be regarded. No reason is given for the supposition that the court erred in giving this judgment."

From an examination of the record, it is apparent that there is no error therein which we are called upon to determine, and it is, therefore, recommended, that the judgment of the trial court be affirmed.

HASTINGS and LOBINGIER, CC., concur.

AFFIRMED.

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PHILIP M. EVERSON V. THE STATE OF NEBRASKA.

FILED JANUARY 21, 1903. No. 12,902.

Commissioner's opinion. Department No. 2.

1. **Criminal Law: PLEADING: PLEA IN ABATEMENT: EVIDENCE: INTOXICATING LIQUORS.** Where a defendant files a plea in abatement to some of the counts in an information, in which he alleges that he has never had a preliminary examination thereon, and the state denies the facts stated in the plea, he must establish such facts by competent evidence or his plea will be overruled.
2. **Criminal Law: PRELIMINARY EXAMINATION: WAIVER: EFFECT: INTOXICATING LIQUORS.** Waiving a preliminary examination in a misdemeanor case cures all defects in the warrant upon which a defendant is arrested; and where one of the grounds of a plea in abatement is a defect in the warrant, and the state, by denial, joins issue thereon, it is incumbent upon the defendant, in order to sustain his plea, to show that he has not waived his preliminary examination.
3. **Detectives: EVIDENCE: WEIGHT: INSTRUCTIONS: INTOXICATING LIQUORS.** An instruction cautioning the jury as to the weight that should be given to the evidence of detectives examined, and *held*, that it did not invade the province of the jury and was properly given.
4. **Appeal and Error: CONFLICTING EVIDENCE: CRIMINAL LAW.** Where the evidence on which a verdict is based, in a misdemeanor case, is conflicting, and it appears that the cause was submitted to the jury under proper instructions, such verdict will not be set aside unless we can say that it is clearly wrong.

ERROR from the district court for Kearney county.
Tried below before ADAMS, J. *Affirmed.*

J. L. McPheely and John Everson, for plaintiff in error.

F. N. Prout, Attorney General, and Norris Brown, Deputy, contra.

BARNES, C.

On the 27th day of January, 1902, a complaint was filed in the county court of Kearney county against the plaintiff in error charging him with a violation of the provisions of chapter 50 of the Compiled Statutes of 1901,

entitled "Liquors." The first count thereof charged him with unlawfully selling intoxicating liquors to one C. F. Evans on the 23d day of January, 1902. The second count charged him with another and different sale made to the same party on the same day, and the third count charged him with unlawfully keeping intoxicating liquors for sale in his place of business, to wit, his drug store, without having obtained a license, or a druggist's permit, or in any other manner having complied with the provisions of chapter 50 of the Compiled Statutes of the state of Nebraska, entitled "Liquors" [Annotated Statutes, section 7150 *et seq.*]. Upon this complaint a warrant was issued, in the body of which, the charge contained in the third count only, was set forth. He was arrested on said warrant and brought before the magistrate. Intoxicating liquors were found in his place of business by the officer and the same were seized and brought into court. The matter came on for hearing before the county judge, acting as an examining magistrate, and the plaintiff filed a motion to dismiss the action, as to the first and second counts, because no warrant had been issued thereon and he had not been arrested on said counts. The court overruled the motion, and it appears that the plaintiff was held for his appearance before the district court, because the next step in the proceedings, as disclosed by the record, was the filing of an information against him in said court charging him with the same offenses set forth in the original complaint. When the case came on for hearing the plaintiff filed a motion to quash the information and the several counts thereof for the reason that they did not state facts sufficient to charge the commission of any crime against him. This motion was overruled, the plaintiff excepted and thereupon filed a plea in abatement, as follows:

"Now comes Philip M. Everson, in his own proper person, and prays judgment that counts Nos. 1, 2 and 4, in the information filed herein, may be quashed for the following reasons:

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"1st. That he has had no preliminary examination thereon as by law provided, prior to the filing of said information.

"2d. For that defendant has never been arrested on said charges in said counts Nos. 1, 2 and 4, no warrant having ever been issued for the arrest of the defendant for the charges set forth in said counts."

To this plea in abatement the state filed the following answer:

"Comes now the plaintiff and for answer to the plea in abatement of the defendant filed herein, denies each and every allegation therein contained."

Upon this issue a trial was had, the facts were adjudged against the plaintiff herein, and the plea was overruled, to which ruling he excepted. Thereupon the case was tried to a jury and he was found guilty upon the first count in the information and not guilty as to all the rest. A motion for a new trial was filed and overruled, and thereupon he prosecuted error to this court.

1. Plaintiff's first contention is, that the court erred in overruling his plea in abatement because, as he claimed, he had never had a preliminary examination on the charge contained in the information upon which he was convicted, and no warrant for his arrest thereon had ever been issued. An examination of the bill of exceptions discloses that in support of his plea, the plaintiff introduced in evidence the complaint filed before the examining magistrate, the warrant and his motion to dismiss as to all of the counts except the third one upon which he concedes he was arrested, the ruling of the court upon his motion, and his exception thereto. This was the only evidence introduced by either side on the trial of the issue raised by the plea in abatement. It was incumbent upon the plaintiff to establish the fact that he had never had a preliminary examination as set forth in his plea by at least some competent evidence. We are unable to say from the record made by him thereon, that no preliminary examination was had on the charge upon which he was

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convicted. The proceedings had before the examining magistrate were not introduced in evidence by either party, and the record is silent as to what occurred after the plaintiff's motion to dismiss was overruled. The plaintiff may have waived his preliminary examination upon the complaint filed before the magistrate. If such was the case he could take nothing by his plea. *Sothman v. The State*, 66 Neb., 302. Or it may be that he pleaded not guilty as to all of the counts contained in the complaint; that evidence was introduced thereon and the magistrate may have found it sufficient to require him to bind the plaintiff over to the district court upon each one of the several counts. The plaintiff having failed to establish the allegations of his plea in abatement, the court properly adjudged the facts against him and overruled the same. While it is true that the warrant, in a criminal case, should contain the charge made against a defendant in the complaint, in most cases, yet in the case at bar a different rule would prevail. Section 21, chapter 50 of the Compiled Statutes, entitled "Liquors" [Annotated Statutes, section 7171], provides: "If upon said examination the magistrate hearing the same shall be satisfied that the person named or described in the complaint, or found in possession of said liquors and premises described therein, had been selling liquors without license, in violation of this chapter, or had said liquors so seized in his or her possession with intent to dispose of the same in violation of this chapter, said magistrate shall hold said person so arrested for trial at the next term of the district court and shall order the liquors so seized destroyed by the officer having them in charge." It thus appears that where a complaint is filed charging a person with keeping intoxicating liquors, or having the same in his possession for the purpose of unlawful sale, under the provision of section 20 a warrant may be issued thereon describing such offense, and by the provisions of section 21 the magistrate is authorized to bind the defendant over to the district court for selling

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such liquors without license if he shall be satisfied that the defendant has been guilty of that offense. This question was before the court in the case of *Sothman v. The State, supra*, wherein the court said:

"The objection to the third count urged in the plea in abatement is, that no warrant had been issued and served on the defendant based on such count, and that the defendant had not been arrested and brought into court on such charge. The purpose of a warrant in a criminal case is to authorize the officer to arrest the accused and bring him before the court or magistrate; when he appears voluntarily and pleads to the information, or his presence is secured in some other way, the issuance of a warrant and the arrest of the defendant would be a work of supererogation."

In the case at bar, as we have above stated, it is not shown whether the plaintiff herein waived his preliminary examination or entered his plea of not guilty to all of the counts in the complaint and in fact had a preliminary examination thereon. For the reasons above suggested and for the lack of evidence to sustain his plea in abatement, we hold that the court did not err in overruling the same.

2. It is next contended that the court erred in giving instruction No. 11, on his own motion, to the jury. Said instruction is as follows:

"You are instructed that in this case the state has called two witnesses to the stand who are what are commonly called detectives. In weighing the testimony of detectives the court instructs you that greater care should be used than in other cases, because of the natural and unavoidable bias or tendency they may have to secure a conviction on account of their employment. However, you are not at liberty to disregard such testimony entirely. Taking into consideration their calling and employment you should consider their demeanor while on the stand, their fairness or want of fairness, whether they are corroborated by other witnesses or circumstances brought out on the trial, the terms of their employment, what interest,

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if any they have, in the result of the trial, as shown by the testimony, and, after considering all of these things, then give to their testimony such weight as you may deem it justly entitled. You are the sole judges of the credibility of each and every witness who has come before you, whether they be detectives or not, and it is your duty to consider them in view of all the facts and circumstances brought out at the trial with a view to ascertaining the truth of the charges preferred against the defendant."

The particular part of this charge objected to is as follows:

"However, you are not at liberty to disregard such testimony entirely."

Whether an instruction is erroneous or not, is not to be determined by a single clause or sentence contained in it. The paragraph should be considered as a whole, and if when so considered it correctly states the law it will not be rendered bad by reason of the fact that an isolated sentence thereof may seem to be erroneous. The instruction excepted to, while possibly not commendable, states the law correctly. Two witnesses had testified for the state, who were detectives, apparently employed to obtain evidence against the plaintiff. It was proper for the court to caution the jury in relation to their evidence. The language used by the court in this charge was substantially the same as that used in the instructions in *Kastner v. State*, 58 Neb., at page 775, 79 N. W. Rep., 713; *Preuit v. The People*, 5 Neb., 377; and *Sandage v. State*, 61 Neb., 240, 85 N. W. Rep., 35.

The jury had no right to disregard any competent testimony which had been admitted on the trial of the case. To disregard means to overlook, to pay no attention to, to ignore. The jury certainly had no right to absolutely ignore the testimony of these witnesses. It was their duty to consider the evidence; to properly regard and weigh it; and then believe or disbelieve it as they should see fit; in other words, give it such weight as in their judgment it was entitled to receive. The province of the jury

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was not invaded in any manner by this instruction, and we hold that it was properly given.

3. It is contended that the evidence is insufficient to sustain the verdict. An examination of the bill of exceptions discloses that there was a conflict of evidence, and upon the whole we are unable to say that the verdict was clearly wrong. The jury under proper instructions, and with all of the evidence before it, passed upon the facts and rendered a verdict of guilty against the plaintiff. We are not at liberty, under our rules, to interfere with it or set it aside. For the foregoing reasons we recommend that the judgment of the district court be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

ELMER E. MORGAN V. CORA A. STONE.

FILED FEBRUARY 4, 1903. No. 11,868.

Commissioner's opinion. Department No. 1.

1. **Justices of the Peace: PRELIMINARY EXAMINATION: RECORD CONCLUSIVE: BASTARDY: STATUTES.** In a proceeding under chapter 37, Compiled Statutes, the record of the justice of the peace before whom the preliminary examination was had, showing that the examination was regularly had and completed, is conclusive upon the question.
2. **Criminal Law: PRELIMINARY EXAMINATION: EVIDENCE OF COMPLAINANT: IMPEACHMENT: BASTARDY: STATUTES.** In a proceeding under chapter 37, Compiled Statutes, the testimony given by the complaining witness at the preliminary examination is not original evidence, but may be introduced for the purpose of confirming or impeaching the testimony of the complaining witness at the trial; but, as the order of proof is largely within the discretion of the trial court, *held*, not prejudicial error to admit in evidence a transcript of such testimony before the direct examination of the complaining witness.
3. **Appeal and Error: TRANSCRIPT INCORRECT: CORRECTION: DOCKET OF JUSTICE AS EVIDENCE.** If a transcript of the proceeding had before a justice of the peace is incorrect, the district court will, upon motion, require a corrected transcript to be supplied; and it is not error to deny an offer to place in evidence the original docket

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of the justice, the party making the offer having previously, upon objection, procured the exclusion of a transcript of such proceedings.

4. **Trial: ISSUE WITHDRAWN.** An issue regarding which there is no competent evidence is properly withdrawn from the jury.
5. **Appeal and Error: INSTRUCTIONS REFUSED.** It is not error to refuse an instruction requested when instructions already given substantially cover the same ground.
6. **Bastardy: INSTRUCTIONS PROPER.** Certain instructions examined, and *held*, not improperly given.
7. **Bastardy: JUDGMENT: VALIDITY: STATUTES.** A judgment rendered in a proceeding under chapter 37, Compiled Statutes, is not void because it fails in express terms to provide for the defendant giving security for the payment of the sums adjudged against him, and thereby securing his liberty.

ERROR from the district court for Furnas county. Tried below before NORRIS, J. *Affirmed.*

John T. McClure, for plaintiff in error.

J. F. Fults, *contra.*

KIRKPATRICK, C.

On February 3, 1900, Elmer E. Morgan was adjudged to be the reputed father of a bastard child born to Cora A. Stone, defendant in error. By the judgment of the court plaintiff in error was required to pay for the maintenance and support of the child the sum of \$750, which was payable in certain amounts upon certain given dates, and plaintiff in error was ordered confined in the county jail until such time as he complied with the order of the court. A supersedeas bond was given by plaintiff in error, and the case is brought to this court by proceedings in error.

The following assignments of error are presented for consideration: (1.) That no preliminary examination of plaintiff in error was had. (2.) That the court erred in its rulings on the admission and exclusion of evidence. (3.) That the court erred in the giving of instructions and the refusal of others requested by plaintiff in error. (4.)

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That the judgment is contrary to law. These assignments will be considered in their order.

Plaintiff in error filed in the district court a plea in abatement, setting up, first, that he had never waived a preliminary examination, and, second, that the preliminary examination shown by the transcript to have been commenced on April 1, 1899, was never completed, but was adjourned until the 8th of April, for further testimony, and, third, that on April 1, 1899, plaintiff in error had offered to settle the matter with the complaining witness and had agreed upon a settlement with her and, with a view of carrying out such settlement, had paid her the sum of one hundred dollars, which she had ever since retained. To this plea defendant in error filed for answer a general denial. It was agreed between the parties that the plea in abatement and the plea of not guilty should be tried together and, at the same time, to a jury.

Defendant in error offered in evidence the transcript of the proceedings of the justice of the peace, to which plaintiff in error objected for various reasons. These objections were sustained, and all of the transcript of the proceedings of the justice was excluded, except the evidence given by defendant in error which had been reduced to writing by the justice. The only other evidence offered touching the plea in abatement was oral evidence offered by plaintiff in error, by which he sought to show that the preliminary examination had been adjourned on April 1, 1899, and had not been completed; and further, he sought to show that the recognizance entered into by him and his father as surety, which required him to be and appear in the district court on the first day of the next term, had been represented by the justice of the peace to be a recognizance requiring him to appear before the justice for a further hearing on April 8. Upon the objection of defendant in error both of these offers were denied by the court. We are unable to perceive error in these rulings. The transcript of the proceedings before the justice of the peace, which had been excluded upon objection of plaintiff

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in error, was the best and only evidence of the action taken by the justice of the peace at the examination before him. The rule in this state is well settled that the record of the justice of the peace showing the proceedings had in a case pending before him, where he had jurisdiction of the subject-matter and the parties, imports absolute verity, and can not be contradicted, varied or changed by oral testimony. *Dryfus v. Moline, Milburn & Stoddard Co.*, 43 Neb., 233; *Jones v. Driscoll*, 46 Neb., 575; *Worley v. Shong*, 35 Neb., 311. It can not be said, therefore, that the ruling of the court in this regard was error.

It is contended that the court erred in its rulings on the admission of evidence. As we have already seen, the court admitted in evidence the testimony taken at the examination before the justice given by the complaining witness. It is contended that this evidence was inadmissible at the time it was offered for the reason that the complaining witness had not yet given her testimony at the trial. The basis of this objection is that the transcript of the evidence taken at the preliminary examination is not original evidence, but admissible only for the purposes of confirmation or impeachment of the testimony given by the complaining witness at the trial. It is well settled that the order in which proofs are admitted is within the discretion of the trial court, and the mere order in which testimony is admitted will not be ground for reversal unless it shall be made to appear that the party complaining has been prejudiced. The evidence complained of was proper in connection with that subsequently given by the complaining witness, and we do not think that the mere order in which it was received in any manner prejudiced the rights of plaintiff in error.

It is contended that the court erred in the exclusion of the docket of the justice of the peace which plaintiff in error offered in evidence. The statute requires that a duly certified transcript of the proceedings of the justice shall be filed in the district court, and it is upon this that the district court acquires jurisdiction of the subject-matter

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of the controversy. The docket of the justice under the circumstances was not admissible. If the transcript incorrectly recited the proceedings had before the justice of the peace, plaintiff in error should, by a proper and timely motion, have applied to the trial court for an order upon the justice to send up a corrected transcript. No attempt to correct the record seems to have been made. The trial court did not err in refusing the offer of the docket entries of the justice.

It is contended that the court erred in refusing to strike out the testimony of one Henry Pierce. It is disclosed by the record that the child was born March 24, 1899, and that conception occurred some time in June, 1898. Pierce's testimony shows that some time early in the spring and in warm weather in 1898, he had on several occasions seen plaintiff in error go to the house of defendant in error after night. It further appears from the testimony that defendant in error resided alone some distance from the town of Wilsonville. The evidence of defendant in error is that plaintiff in error had intercourse with her from time to time during the spring and summer as far back as March, 1898. The testimony of the witness Pierce was material and admissible as tending to corroborate the testimony of the complaining witness.

It is contended that the court erred in the matter of permitting unwarranted cross-examination of one Ed Paugh, a witness called by plaintiff in error. This is a matter within the sound discretion of the trial court, and there appears to have been no abuse of such discretion.

Other alleged errors in the court's rulings on the evidence are suggested, but we are unable, after a careful examination of the evidence and the rulings thereon, to perceive that in this regard plaintiff in error was prejudiced.

It is urged that the court erred in refusing instructions Nos. 1 and 4, requested by plaintiff in error. Instruction No. 1 requested presented for the consideration of the jury the merits of the plea in abatement of plaintiff in error. To this plea defendant in error had filed a general denial.

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Thus the burden of proof was on plaintiff in error to sustain the plea. The only competent evidence bearing upon the question whether or not a preliminary examination was had was offered by defendant in error and excluded on objection by plaintiff in error, who offered by parol testimony to show that no complete preliminary examination was ever had. This testimony was excluded by the trial court, and as we have seen, correctly so. There was, therefore, no competent evidence supporting the plea in abatement, and the withdrawal of that question from the jury was consequently not error. The matter sought to be submitted by plaintiff in error's requested instruction No. 4 was sufficiently and properly covered by instructions Nos. 6 and 9, given by the court on its own motion. It was, therefore, not error to refuse this instruction.

Instructions given by the court upon its own motion, Nos. 3, 4 and 10, are alleged to be erroneous. Instruction No. 3 is as follows: "You are instructed that in determining whether or not the defendant is the father of said bastard child, it is entirely immaterial as to the plaintiff's chastity prior to the time that the child in question was begotten, and it is improper for you to consider in passing upon this point, or take into consideration the fact, that the plaintiff was the mother of another bastard child several years previous to the birth of this one."

It is said of this instruction that it took from the jury a question which they had a right to consider as affecting the credibility of the complaining witness. It is claimed that she had testified that she had had no intercourse with any other man than plaintiff in error, and at the same time admitted that she was the mother of a bastard child, about eight years old at the date of the trial. From an examination of the testimony of defendant in error, we are clearly of the opinion that it will not bear the construction sought to be placed upon it. We think, under the evidence in the case, this instruction was properly given.

The fourth instruction given by the court on its own

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motion expressly withdraws from the jury consideration of the plea in abatement, and this, as already determined, was not error.

Of the tenth instruction given, it is said that it is not based upon the evidence and the pleadings; that it contains repetitions of matters already gone over in previous instructions; that it invades the province of the jury in attempting to tell them what weight is to be given to certain testimony. After a careful examination of this instruction, we are unable to see that it is vulnerable to any of the objections urged. This instruction, in effect, tells the jury that the chastity of the plaintiff is not in issue in the absence of any testimony tending to prove that she had intercourse with other men than the defendant at or near the time the child was begotten, and it further announced that the fact of the plaintiff being the mother of a bastard child did not disqualify her as a witness, and that the jury should give her testimony and that of the defendant such weight as it was entitled to, taking into consideration the interest that each had in the result of the suit; and the jury were further informed that the cause being tried was purely a civil action for the purpose of determining the paternity of the child, and that the sole question for them to determine was whether the defendant was the father. This instruction seems to have been applicable to the pleadings and the evidence, and its giving was not prejudicial to plaintiff in error.

It is contended that the judgment of the trial court is void for the reason that it does not permit plaintiff in error in any manner to secure the amount which the court found he should pay for the support and maintenance of the child. No motion seems to have been presented to the trial court for modification of the judgment, nor does it seem to have been, in any manner, brought to the attention of the trial court. There can be no doubt of the right of plaintiff in error, by complying with the terms of the statute, and giving security as contemplated by law for payment of the amounts adjudged against him, to be dis-

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charged from custody. While the judgment, perhaps, is not in good form, it clearly is not void, and we are unable to see in what respect plaintiff in error has been prejudiced.

There is no contention that the verdict is not sustained by the evidence, and from an examination of the entire record, we are convinced that justice has been done in the premises. It is, therefore, recommended that the judgment of the trial court be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

GEORGE BURKE COMPANY V. CHARLES H. FOWLER ET AL.

FILED FEBRUARY 4, 1903. No. 12,024.

Commissioner's opinion. Department No. 1.

1. **Trial: CROSS-EXAMINATION: COLLATERAL MATTERS: SUBSEQUENT CONTRADICTION.** When a witness is cross-examined on a matter collateral to the issue he can not, as to his answer, be subsequently contradicted by the party putting the question. *Johnston v. Spencer*, 51 Neb., 198, followed.
2. **Trial: CROSS-EXAMINATION: COLLATERAL MATTERS: TEST.** The test of whether a fact inquired of in cross-examination is collateral is, would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea? *Johnston v. Spencer*, 51 Neb., 198, followed.

ERROR from the district court for Valley county. Tried below before LETTON, J. *Reversed.*

Hall & McCulloch and Clement Bros., for plaintiff in error.

Aaron Wall, John Wall and O. A. Abbott, contra.

DAY, C.

George Burke Company brought this action in the district court for Valley county against Charles H. Fowler,

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and others, to recover the possession of 205 head of cattle. The plaintiff alleged a special ownership in the cattle and the right of possession thereof by virtue of two chattel mortgages executed by E. A. Fowler, one of the defendants, to the plaintiff. Facts were also alleged showing a default in the mortgage and the plaintiff's right of possession to the mortgaged property. One hundred and sixty-nine head of the cattle were taken by the sheriff under the writ and turned over to the possession of the plaintiff. The defendants filed separate answers. Alonzo A. Fowler alleged title to sixty-eight head of the cattle taken under the writ and Charles H. Fowler claimed the balance. Upon the trial, the jury found that at the commencement of the action the defendants Alonzo A. Fowler and Charles H. Fowler, were the owners of and entitled to the immediate possession of the cattle in controversy, and found that the property which belonged to Alonzo A. Fowler was of the value of \$2,620, and that the property which belonged to Charles H. Fowler was of the value of \$2,575. Judgment was entered upon the verdict and plaintiff brings error.

The facts in the case are substantially as follows: On May 11, 1899, the defendant E. A. Fowler executed and delivered to the plaintiff two promissory notes, one for \$9,158 and the other for \$9,000, both bearing interest at eight per cent. and both due and payable on November 11, 1899. The consideration for these notes was for money loaned by the plaintiff, \$9,000 of which were loaned at the time, the balance being a renewal of a prior loan. To secure this indebtedness, E. A. Fowler executed a mortgage upon 698 head of cattle, which at the time were rounded up and branded with a bar brand thus, \ on the left hip. The counting and branding were done by the defendants with the assistance of plaintiff's agents. It was the intention of the parties to brand and include in the mortgages all of the cattle owned by E. A. Fowler, but in the round-up about sixteen head were overlooked. Of the cattle included in the mortgage, two hundred were

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cows from three to eight years old. The mortgages expressly provided that the increase of the cows and heifers was included in and covered by the mortgage.

In September, 1899, the plaintiff sent an agent to look up its security, and of the cattle included in the mortgage, only about five hundred could be found. These were sold by E. A. Fowler, with the plaintiff's consent, and the proceeds of the sale applied upon the mortgages, leaving a balance still due thereon of about \$6,000.

The plaintiff's case was made largely upon the testimony of David A. Johns and his wife. Johns testified that he was working for E. A. Fowler at the time of the branding of the cattle; that early in the morning of May 11, 1899, before the arrival of plaintiff's agents, forty-one head of the cattle were taken from the pasture of Alonzo A. Fowler and about one hundred and thirty-six head from Charles H. Fowler's and driven to E. A. Fowler's ranch and there mixed with other cattle in the yards; that after the arrival of plaintiff's men, all these cattle were branded with a bar brand on left hip and included in the plaintiff's mortgage; that Alonzo A. Fowler knew of the branding and that Charles H. Fowler actively assisted in the operation; that in the evening of said day, after the departure of the plaintiff's agents, about twenty milch cows which had been brought from Charles H. Fowler's place, were rebranded by placing the same bar brand across the one previously put on, making a cross or X out of it and were then driven back to Charles H. Fowler's place; the same night forty-one head, previously obtained from Alonzo A. Fowler's pasture, were returned to his pasture. On the following morning the balance of the cattle which had been brought over from Charles H. Fowler's place were rebranded by making the bar into an X or cross, and then were taken back to Charles H. Fowler's pasture; that in October, 1899, Alonzo A. Fowler branded the forty-one head with the letter A, placing the brand over the bar brand placed there in May. The testimony of the witness in many particulars was corroborated by the testimony

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of his wife and was also corroborated by many of the circumstances and facts detailed by other witnesses. Upon the main facts of the case the witness, Johns, was flatly contradicted by the testimony of the defendants.

The errors assigned and relied upon for a reversal of the case relate almost entirely to the ruling of the court in admitting or excluding testimony, some of which, only, we deem it necessary to review. Upon the cross-examination of the witness, Johns, he was asked questions and gave answers as follows:

Q. Do you know Mr. Mackrill?

A. Yes, sir, I know him.

Q. You remember of seeing him that spring after you came back from Omaha and before the cattle were replevied?

A. No, I don't remember of seeing him; I see him very often.

Q. You remember of seeing him this fall?

A. I see him every few days.

Q. Where does your father live?

A. North of Arcadia.

Q. How far north?

A. Two and one-half miles.

Q. Do you remember of riding out to your father's place after you came back from Omaha, with Mr. Mackrill?

A. I think so.

Q. Who else was with him?

A. No one.

Q. Do you remember of having a conversation with him on the way out in regard to Alonzo Fowler's cattle?

A. No, sir.

Q. Didn't you tell him if Alonzo Fowler would do the right thing that you would save his cattle for him, that they ought not to take his cattle?

A. No, sir, I didn't.

Q. Nor words to that effect?

A. No, sir, I didn't. If we were talking about it, about them, there was something said that way that he didn't know that they was branded; and he might get them back.

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Q. But you didn't tell him that if Alonzo Fowler would come to you and do the right thing that you would help him save his cattle?

A. No, sir.

The defendants then called Mr. Mackrill and after identifying the conversation detailed by the witness, Johns, he was asked: "Now you may state if at that time and on that journey, Mr. David Johns said to you that if Alonzo Fowler would do the right thing by him he would help him save his cattle?" Over the objection of the plaintiff, the witness answered, "He did."

It will be noted that the questions asked of Johns were entirely collateral to any of the issues in the case and related solely to his credibility. It was not competent, therefore, to introduce the testimony of the witness, Mackrill, as tending to impeach or contradict Johns with reference to the particular matters about which Johns was interrogated.

In *Johnston v. Spencer*, 51 Neb., 198, the rule is stated as follows: "When a witness is cross-examined on a matter collateral to the issue he can not, as to his answer, be subsequently contradicted by the party putting the question." And it is also said: "The test of whether a fact inquired of in cross-examination is collateral is, would the cross-examining party be entitled to prove it as a part of his case, tending to establish his plea." The same rule is recognized in *Smith v. State*, 5 Neb., 181, where the rule announced by Greenleaf is quoted with approval as follows: "A witness can not be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony. And, if a question is put to a witness which is collateral and irrelevant to the issue, his answer can not be contradicted by the party who asked the question; but is conclusive against him." The same principle is recognized in *George v. State*, 16 Neb., at page 321; *Frederick v. Ballard*, 16 Neb., 559; *Farmers' Loan & Trust Co. v.*

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Montgomery, 30 Neb., at page 39; *Hooper v. Browning*, 19 Neb., at page 428; *Republican Valley R. Co. v. Linn*, 15 Neb., 234; *Carpenter v. Lingenfelter*, 42 Neb., 728; *Myers v. State*, 51 Neb., 517; *McDuffie v. Bentley*, 27 Neb., 380.

In our opinion, the trial court erred in allowing the evidence in contradiction of the witness Johns' denial of the alleged statements made to Mackrill. The purpose of the testimony was not to prove any fact in issue but to show to the jury that Johns was unworthy of belief. The method sought to be pursued by the defendants to impeach the witness, Johns, by evidence showing a contradictory statement upon a matter collateral to the issue is not permissible. It seems clear to us that this testimony was clearly prejudicial to the plaintiff's rights, and for this error the case must be reversed.

There are other errors assigned and argued but they are not likely to arise again upon a retrial, and for that reason, will not be discussed.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

HASTINGS and KIRKPATRICK, CO., concur.

REVERSED AND REMANDED.

WINNIFRED EGAN V. ALLEN LIGHT.

FILED FEBRUARY 4, 1903. No. 12,099.

Commissioner's opinion. Department No. 3

1. **Trespass: INJUNCTION: EVIDENCE SUFFICIENT.** Evidence examined, and held sufficient to sustain the findings.
2. **Boundaries: AGREEMENT FIXING THEM: BINDING EFFECT.** Where the true boundary line between adjoining owners is uncertain and unknown to them and may be ascertained only at more or less trouble and expense, an executed agreement to accept and abide by a certain line as such boundary, is binding upon the parties

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and subsequent purchasers having notice thereof, although the boundary agreed upon may not be the true line.

3. Boundaries: DESCRIPTION OF LAND: INSUFFICIENT. The description in the decree, of the lands in controversy, *held*, not sufficiently definite and certain.

ERROR from the district court for Grant county. Tried below before SULLIVAN, J. *Reversed with directions.*

L. E. Kirkpatrick and W. H. Thompson, for plaintiff in error.

Smyth & Smith, contra.

ALBERT, C.

This case was submitted and argued in connection with that of *Lynch v. Egan*, — Neb., —, 93 N. W. Rep., 775. Like the latter, it is a suit in equity to restrain the defendant from trespassing on the plaintiff's land, and involves the question of location of the boundary lines between the lands of the respective parties. The plaintiff insists on a line which, he alleges, was agreed upon by himself and the defendant at a time when the true boundary was uncertain and unknown to either party. Whether such agreement was made is one of the questions of fact in the case. It is conclusively established, however, that the parties joined in the expense of the erection of a fence along a part of this line and apparently treated it as the true boundary for a number of years previous to the commencement of this suit. The court found in favor of the plaintiff and granted the relief prayed. The defendant brings the case here on error.

The court found that the parties had made the agreement as to the boundary, hereinbefore mentioned, and that they acquiesced therein for more than six years. The defendant contends that the finding as to the agreement is not sustained by sufficient evidence. We have examined the evidence with some care and are satisfied that, taken as a whole, and in the light of the conduct of

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the parties, it is amply sufficient to sustain the finding. As in the case of *Lynch v. Egan, supra*, it is insisted that such agreement is not binding and in that behalf the arguments advanced in *Lynch v. Egan, supra*, are again employed. In this case, the fact of the agreement, and that it was made at a time when the true boundary was uncertain and unknown to the parties, is established by the findings of the court. The effect of such agreement, made under such circumstances, is discussed in *Lynch v. Egan, supra*. It is unnecessary to reiterate what has been said in that case. It will suffice, at this time, to say that the agreement is binding and conclusive upon the parties to this suit.

But one question remains, that is not disposed of in the case above referred to, and that is, whether the decree is void for uncertainty in the description of the land. The description as given in the decree is as follows:

"Commencing at the closing corner established by the United States surveyor, Alt, in May, 1900, on the north boundary of the Winnifred Egan pre-emption and east boundary of the Light timber claim in section eight, township 22, north, range 37, thence south twenty-one minutes, east twenty-seven chains and three links to the northeast corner of the Moran tree claim as established by said Alt; thence south along the east boundary line of the Moran claim thirteen chains to the closing corner established on the south boundary line of the Winnifred Egan pre-emption; thence west three and seventy-one hundredths chains to the southwest corner of the Winnifred Egan pre-emption as established by Alt; thence north along the west boundary line of the Winnifred Egan claim forty chains to the northwest corner of said claim as surveyed by Alt; thence east to the place of beginning."

The plaintiff insists that the survey referred to in the description, was made in pursuance of an act of congress passed in 1890, for a resurvey of the lands in the county where the lands in question are situated, and that the field notes of that survey are on file in the office of the commis-

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sioner of public lands and buildings, in this state. Those facts would probably make the description sufficiently certain, if it were clear from the record that the survey referred to in the decree was, in fact, the survey made in pursuance of the act of congress in question, provided the decree referred specifically to the descriptions as shown by that survey, but that is not the record before us. A decree fixing boundary lines, which is intended to be binding upon the parties and their privies for all times, should possess a higher degree of certainty than that shown by the decree before us. From the record it appears that the decree can be corrected in this particular without further evidence.

It is therefore recommended that the decree of the district court be reversed, and the cause remanded with directions to the district court to enter a decree specifically describing the lands in controversy.

AMES and DUFFIE, CC., concur.

The decree of the district court is reversed and the cause remanded with directions to the district court to enter a decree specifically describing the lands in controversy.

REVERSED WITH DIRECTIONS.

FARMERS MUTUAL INSURANCE COMPANY V. IDA MAY COLE.

FILED FEBRUARY 4, 1903. No. 12,123.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: TRIAL: CROSS-EXAMINATION.** Where misconduct of counsel is not charged, error can not be predicated upon the mere asking of a question upon cross-examination, to which no answer is made by the witness, although objection is made to the question and by the court overruled.
2. **Appeal and Error: INSTRUCTIONS: WAIVER OF ERROR.** Error of the trial court in the submission of an issue to the jury is waived if

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the party complaining, by a requested instruction, which was refused, asked to have the same issue submitted.

3. **Appeal and Error: WAIVER OF ERROR.** A party can not be heard to complain in the appellate court of an error which he has been instrumental in bringing about.
4. **Insurance: CONFLICT OF LAWS: STATUTES: CONSTRUCTION.** Section 43, chapter 43, Compiled Statutes, 1899, and section 51 *et seq.* of chapter 43, Compiled Statutes, 1899 [chapter 33, page 272, Laws of 1891; Annotated Statutes, section 6474 and section 6506 *et seq.*], examined, and *held* that there is no such conflict between the two acts as to preclude the application of the former to insurance companies organized under the latter act.
5. **Insurance: CONFLICT OF LAWS: SPECIFIC ALLEGATIONS.** Where one bases his rights upon an alleged conflict between an earlier and a later act of the legislature, he should specifically point out the conflict relied upon.
6. **Insurance: STATUTES: CONSTITUTIONALITY.** Section 45, chapter 43, Compiled Statutes, 1899 [Annotated Statutes, section 6476], is constitutional. *Farmers & Merchants Insurance Co. v. Dobney*, 62 Neb., 213, 86 N. W. Rep., 1070, adhered to.

ERROR from the district court for Douglas county. Tried below before SLABAUGH, J. *Affirmed.*

E. M. Coffin, Bartlett & Baldrige and *E. J. Clements*, for plaintiff in error.

That part of the act of 1899, known as the valued policy law [section 45, chapter 43, Compiled Statutes], which permits and directs the taxation of an attorney's fee against an insurance company on rendition of a judgment on a policy of insurance on real estate, is inimical to section 1, article 14, of the constitution of the United States. *San Antonio & A. P. R. Co. v. Wilson*, 19 S. W. Rep. [Tex.], 910; *South & N. A. R. Co. v. Morris*, 65 Ala., 199; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S., 150.

The provisions of a subsequent act control those of a prior one, and the provisions of a special statute prevail over those of a general one on the same subject when there is a conflict between them. The act under which plaintiff in error is organized is a special statute complete in itself and furnishes the method by which the amount of losses

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sustained by its members is to be ascertained and adjusted. This act was passed subsequently to the so-called valued policy law, and the provisions of said valued policy law do not apply to the plaintiff in error. *McCann v. McLennan*, 2 Neb., 286; *The People v. Gosper*, 3 Neb., at page 310; *White v. The City of Lincoln*, 5 Neb., 505; *State v. McCutig*, 8 Neb., 215; *Albertson v. State*, 9 Neb., 429; *County of Richardson v. Miles*, 14 Neb., 311; *State v. Howe*, 28 Neb., 618; *State v. Moore*, 48 Neb., 870; *State v. Cornell*, 53 Neb., 556.

To entitle a party to relief on the ground of false representations, it is not necessary for him to allege or prove that a party making said representations knew that they were false. The question of the good faith of the party making said representations is not involved. *Phillips v. Jones*, 12 Neb., 218; *Hock v. Bowman*, 42 Neb., 80; *Foley v. Holtry*, 43 Neb., 133; *Johnson v. Gulick*, 46 Neb., 817; *Field v. Morse & Co.*, 54 Neb., 789; *Gerner v. Mosher*, 58 Neb., at page 155.

T. J. Mahoney and J. A. C. Kennedy, contra.

The act authorizing the incorporation of this class of insurance companies is a complete act in itself, in the sense that it is not amendatory of other legislation, and therefore not in violation of the provisions of the constitution respecting amendatory acts.

Prior to the adoption of the valued policy law in 1880, the following provisions of our statutes recognized the existence of mutual insurance companies, as shown by the Compiled Statutes of 1887, to wit: section 13, chapter 16; sections 3, 19, 30 and 40, chapter 43. These various provisions being in force, and authorizing mutual insurance companies without capital stock, if it had been the intention that the valued policy law should not apply to mutual insurance companies, it is fair to presume that they would have been expressly excepted from its operation. But instead of an express exception, section 1, of the

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valued policy act, by its express terms, applies to every policy of insurance on real property. The act of 1891, authorizing the incorporation of farmers' mutual companies, does not purport to exclude the valued policy act, and being passed at the next session of the legislature, and mutual companies having existed prior to the valued policy act, the only fair and reasonable presumption is, that if it had been intended to exclude the operation of the valued policy act from policies issued by companies organized under the act of 1891, such intent would have been expressed in the act of 1891.

The instruction, that representations, in order to defeat the policy, must have been fraudulently made, the parties at the time knowing they were false, is correct even as an abstract statement of law. Cases in which a party, who has been deceived by misrepresentations, seeks to rescind his contract, thereby placing the parties *in statu quo*, are not applicable to this situation, because it is of the very nature of rescission that both parties are to be placed where they would have been had the misrepresentations not been made. A rescission may be based on mere mistake, as well as on fraud, and it would be inequitable to deny a rescission induced by misrepresentation, even though the misrepresentation was innocently made. But when an insurance company seeks to defeat a recovery on a policy on the ground of misrepresentations, its defense is in the nature of an action for damages. There is no attempt then to rescind, and no attempt to place the parties *in statu quo*. In that class of cases such a defense ought not to be permitted unless the representation was fraudulently made, and we think this court has in effect so held. *Kettenbach v. Omaha Life Association*, 49 Neb., 842; *Aetna Insurance Co. v. Simmons*, 49 Neb., 811.

KIRKPATRICK, C.

This is an action brought in the district court of Douglas county by defendant in error against plaintiff in error

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to recover for loss arising on an insurance policy. Trial was had to a jury which resulted in a verdict and judgment for defendant in error, to reverse which the cause is brought to this court, the errors assigned being (1), that the court erred in its rulings on the admission of certain testimony; (2), that the court erred in the giving and refusal of instructions; (3), that the court erred in holding that the valued policy law had application to mutual insurance companies of the character of plaintiff in error; (4), that the court erred in taxing attorneys' fees to plaintiff in error. These several questions, so far as necessary to a determination of this controversy, will receive consideration in the order named.

The first error complained of arose upon the cross-examination of one Chapman, who was the party who constructed and formerly owned the barn which had been destroyed by fire. On cross-examination of this witness by defendant in error, he was asked, "Is it not a fact, Mr. Chapman, that you are living under the name of Mitchell with a woman other than your wife in the state of California?" An objection by plaintiff in error was overruled, to which ruling an exception was taken in due form, but the witness declined to answer, and the question remained unanswered; so that the testimony sought to be elicited by defendant in error was in fact never received. There is no complaint of improper conduct on the part of counsel for defendant in error, and we are unable to see under the circumstances how the simple asking of a question to which no answer was made can have been prejudicial to plaintiff in error. This point seems to be wholly without merit.

Complaint is made by plaintiff in error of instruction No. 4, given by the court, which reads as follows:

"You are instructed that it is essential for the defendant to prove in support of its allegations of fraud as a defense, all of the following:

"1. That plaintiff herself, or through her agent, in her application for the insurance, made certain statements or

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representations concerning the property sought to be insured.

"2. That such representations were false when made.

"3. That they were false in some particulars material to the insurance risk.

"4. That they were known by plaintiff to be false when they were made.

"5. That they were made intentionally by the plaintiff, or her husband as her agent, to defraud the defendant company, and that the defendant insurance company relied upon such representations and acted thereon in the issuing of the policy sued on."

It is now contended by plaintiff in error that the submission in this instruction of the issue of the good faith of the insured was error, because, as stated by counsel in brief, "it is the law of this state, thoroughly settled by a long and unbroken line of decisions, that in order to entitle a party to relief because of false representations, it is not necessary for him to plead or prove that the party making such representations knew them to be false." *Field v. Morse & Co.*, 54 Neb., 789; *Gerner v. Mosher*, 58 Neb., 135, and other cases are cited and relied on.

Our examination of the authorities bearing upon the question of the liability of insurance companies in cases such as that under consideration has led us to the conclusion that so far as the instruction under consideration, taken independently of other facts and features of the case, submits to the jury the question of the knowledge of plaintiff below of the falsity of the representations at the time they were made, and her *mala fides* in making them in order to procure the issuance of the policy, it was a wrong statement of the law. As we read and understand the prior decisions of this court upon the question, in order to defeat recovery, the company must show that the answers were made as written, that they were false, and false in some particular material to the insurance risk, and that the company relied upon their truth in issuing the policy. If an answer is false in a particular material to the risk, and

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is so proven on the trial, we do not see how recovery by the insured may be had upon proof by him that such substantially false answer was made in good faith, and in ignorance that it was false. Nor do we understand that this court has at any time said that the *mala fides* of the applicant in making a representation materially false is an essential part of the averment and proof of the defendant company. It is only necessary to show, under proper pleadings, that the representation, as actually made by the insured, was false in a particular material to the insurance risk.

It is true, as said by counsel for defendant in error, that in *Kettenbach v. Omaha Life Ass'n*, 49 Neb., 842, this court said that the material allegations were that the answers were made as written, that they were false, and false in some particular material to the risk, and that they were made intentionally by the insured, etc. But by this language we do not understand that it was intended to make it essential to prove that the statements materially false must be shown to have been made false by intention, that is, were knowingly and intentionally false; but rather, that the statement which is materially false, was made intentionally, that the applicant knowingly and intentionally made the statement, without reference to whether its falsity was within his knowledge and intention, because it might sometimes occur that an answer proven to be substantially false was not made intentionally by the insured. *Etna Insurance Co. v. Simmons*, 49 Neb., 813.

But can it be said, under the record in this case, that the submission of this question was prejudicial error? In the answer of defendant company it is repeatedly charged that "the said Ida May Cole, for the purpose of obtaining said insurance, * * * in a written application therefor, falsely and fraudulently, and for the purpose of defrauding said defendants, represented the then present cash value of said barn at \$1,400, * * * and it was not worth to exceed \$400, all of which was known to the plaintiff," and throughout the entire answer language to this

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effect occurs. It is, therefore, apparent that the issue of the good faith of the insured in making the representations claimed by the defendant company to be materially false was distinctly presented by the pleadings of the defendant company. It was a part of the theory of defendant company's case that the defendant in error had been guilty of fraud in knowingly and fraudulently making false answers for the fraudulent purpose of procuring the policy. Plaintiff in error can not, therefore, be permitted on appeal to urge that the issue of good faith was not in the case when, by its own pleadings and conduct at the trial, it led its adversary to believe that it would seek to prove bad faith as an element of its case and as a reason why it should recover.

The same may be said concerning the admission of certain testimony regarding which plaintiff in error now complains, testimony tending to show that plaintiff below had acted in good faith at the time the application was written, and had given the value of the property as she at that time believed it to be. Such testimony was to disprove the allegation in plaintiff in error's answer that the value had been knowingly and fraudulently misrepresented. If the admission of such testimony was error, it was error in the procurement of which defendant company was instrumental. It is a principle never questioned in this court, and in *Missouri P. R. Co. v. Fox*, 60 Neb., 531, is declared to be sound and salutary, that a party can not be heard to complain of an error which he himself has been instrumental in bringing about. The testimony complained of was material to an issue tendered by plaintiff in error, and the presence of which in the case it subsequently assumed by the request for an instruction hereafter to be considered, which by the trial court was refused.

The instruction referred to is as follows: "If you find from the evidence that the plaintiff, either in person or through her representative, John J. Cole, purposely made false and fraudulent representations to the defendant to secure the insurance on the barn in question, and that such

representations were material to the taking of the risk by the defendant, and that the defendant has not waived them, then the plaintiff can not recover."

We have compared the instruction given with that tendered and refused, and can not see in what substantial particular they do not agree. By the tendered instruction the jury were told to inquire whether plaintiff made her representations falsely and fraudulently in order to secure the insurance. We have then, this situation: the issue of good faith tendered by the answer of plaintiff in error; evidence on the trial tending to show good faith; an instruction requested by plaintiff in error asking that the question of good faith be submitted to the jury, its refusal, and the giving of another in lieu thereof submitting such question. It would certainly seem that plaintiff in error should not now be permitted to complain because the issue was submitted. It has been repeatedly said by this court that error can not be predicated upon the submission of an issue, where the party alleging such error, by a request for an instruction, himself asked the submission of the issue. *Omaha Fair & Exposition Association v. Missouri P. R. Co.*, 42 Neb., 105; *Jonasen v. Kennedy*, 39 Neb., 313; *City of Omaha v. Richards*, 49 Neb., 244. Plaintiff in error would be in no better position had the instruction by it requested been given, and in that event it would be clearly estopped to allege error. To hold otherwise would be to permit one to urge error, the commission of which was brought about by himself. *Missouri P. R. Co. v. Fox*, *supra*.

Our examination of the evidence has led us to the conviction that the representations as in fact made were not materially false, and, in the absence of all the testimony, intended to prove good faith, in the absence of that issue as tendered by plaintiff in error in its answer and in its requested instruction, and in the instruction given by the court, the jury would still have been clearly warranted in finding for the defendant in error. We are constrained, therefore, to hold that the instruction complained of was

not prejudicially erroneous to the rights of plaintiff in error.

It is next contended by plaintiff in error that the provisions of section 43, chapter 43, Compiled Statutes, 1899 [Annotated Statutes, section 6474], known as the valued policy law, are not applicable to plaintiff in error for the reason that it is a company incorporated under a special act authorizing the organization of mutual insurance companies. Chapter 33, page 272, Laws, 1891, section 51 *et seq.*, chapter 43, Compiled Statutes, 1899 [Annotated Statutes, sections 5606 *et seq.*]. It is contended that this act is complete in itself, that it was adopted later than section 43, chapter 43, and that section 43, being in conflict therewith, can not be deemed applicable to plaintiff in error. The instructions requested by plaintiff in error were based upon the theory that the valued policy law was inapplicable to plaintiff in error, while the court, in refusing these instructions, gave others to the effect that the valued policy law did apply to plaintiff in error.

In the brief of counsel for plaintiff in error it is said: "That there is a conflict between the provisions of the valued policy law and the special statute of 1891, under which the plaintiff in error was organized, can not be denied."

No attempt is made to direct our attention to any of the provisions of the respective acts claimed to be in conflict. Our own examination has failed to disclose any conflict. Upon an inspection of section 51, *et seq.*, under which plaintiff in error was incorporated, it is apparent to us that in its enactment the legislature had in mind the valued policy law, and regarded it as applicable to the companies whose organization is provided for in the act of 1891. We can see no valid reason why it should not apply, and there are certainly many good reasons why it should. The contention of plaintiff in error in this regard can not be sustained.

The final contention is that the court erred in taxing attorneys' fees to plaintiff in error in rendering judgment

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against it, authority for which action is found in section 45, chapter 43, Compiled Statutes, 1899 [Annotated Statutes, section 6476]. It is contended that this law is unconstitutional. The question raised was considered by this court in *Farmers & Merchants Insurance Co. v. Dobbey*, 62 Neb., 213, 86 N. W. Rep., 1070, where the following language was used:

"The provision of section 3 of the valued policy law (section 45, chapter 43, Compiled Statutes, 1899), permitting the taxation as costs of a reasonable attorney's fee upon rendering judgment against an insurance company on a contract insuring real estate, is grounded on considerations of public policy, and is constitutional." With the conclusion reached in that case we are content, and do not deem it necessary to re-examine the question.

It follows from what has been said that the judgment of the lower court is correct, and it is recommended that the same be affirmed.

HASTINGS, C., concurs.

AFFIRMED.

JAMES F. LANSING, EXECUTOR OF THE LAST WILL AND TESTAMENT OF MARY F. FULLER, DECEASED, APPELLEE, v. THE COMMERCIAL UNION ASSURANCE COMPANY, LIMITED, APPELLANT.

FILED FEBRUARY 4, 1903. No. 12,172.

Commissioner's opinion. Department No. 1.

1. **Contracts: MISTAKE: REFORMATION IN EQUITY: INSURANCE.** Where the parties to a written contract, by reason of a misconception of the legal import of certain language used in reducing their contract to written form, fail to incorporate therein the actual agreement entered into between them, equity will grant relief in a proper case by reformation of the contract, conforming it to the intention of the parties.
2. **Insurance: CONTRACTS: MISTAKE: LAW ACTION: INJUNCTION: REFORMATION IN EQUITY: CONSOLIDATION OF ACTIONS.** Where an action at law has been commenced on a fire insurance policy, and

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after the defendant has answered, it appears that a recovery can not be had thereon in the law action on account of a mutual mistake of the parties to the insurance contract, equity will, at the instance of the plaintiff, stay the prosecution of the action at law, and entertain a bill to reform the policy, consolidating the two actions, and render judgment for the sum found due on the policy as reformed.

3. **Insurance: CONTRACTS: MISTAKE: LAW ACTION: INJUNCTION: REFORMATION IN EQUITY: CHANGE OF THEORY OF PARTIES.** A party can not adopt one theory of his case, proceed to judgment thereon, and if such judgment is adverse, relitigate his case upon a new theory; but this principle does not apply to a suit in equity on the ground that the plaintiff has commenced an action at law, where the object and purpose of the equity suit are to stay the prosecution of the law action until the contract there sued upon can be reformed on account of mistake; the two actions not being inconsistent, but one is auxiliary to and dependent upon the other.
4. **Insurance: LIABILITY DENIED: WAIVER OF PROOFS OF LOSS: CONTRACTS.** Where an insurance company denies all liability on a policy on the ground that it was not in force at the time the loss occurred, it waives all question whether proper and sufficient proofs of loss have been furnished.
5. **Insurance: CONTRACTS: MISTAKE: REFORMATION IN EQUITY: EVIDENCE SUFFICIENT.** A bill in equity, seeking reformation of an insurance policy, alleged that by mistake of fact and by error the policy was issued in the name of the "estate of W. C. H." It appeared that both parties knew the status of the title, but through a mistake as to the legal import of the language used, the policy was made to run in the name of one not the owner. *Held*, That the evidence was sufficient to sustain a decree of reformation.
6. **Insurance: STATUTES: CONSTITUTIONALITY: CONTRACTS.** Section 45, chapter 43, Compiled Statutes, 1899 [Annotated Statutes, section 6476], is constitutional and valid. *Lancashire Insurance Co. v. Bush*, 60 Neb., 116.

APPEAL from the district court for Lancaster county.
Tried below before CORNISH, J. *Affirmed*.

Ricketts & Ricketts, for appellant.

Lionel C. Burr, Elmer E. Spencer and Willard E. Stewart, contra.

KIRKPATRICK, C.

On March 29, 1901, appellee James F. Lansing filed his petition in equity in the district court of Lancaster county

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against the Commercial Union Assurance Company, Limited, of London, appellant, alleging the death of Mary F. Fuller, his testate, his appointment and qualification as executor; that prior to her death Mary F. Fuller was the owner, and in possession, and had an insurable interest in what was known as the Oriental Hotel, situated upon certain lots described, in the city of Lincoln, Lancaster county, Nebraska; that on the 5th day of September, 1899, the property was insured by appellant in the sum of \$1,250; that by mutual mistake of appellee's testate, and the agent of the assurance company, the policy was issued in the name of the estate of W. C. Heddleson, and also described the lot upon which the hotel was situated as being in another block than that in which it in fact was; that on the 27th day of September, 1899, the building was destroyed by fire; that appellee's testate furnished proper proofs of loss, and that proofs of loss were also waived by appellant; that appellant refused to pay any part of the loss; that appellee's testate during her lifetime, and on the 19th day of January, 1900, commenced an action at law in the district court of Lancaster county against appellant, to recover the loss arising on the policy; that appellant denied all liability, first, because the policy on its face was payable to the estate of W. C. Heddleson, and second, because the policy did not describe the lots upon which the building was situated, and third, because the proofs of loss were insufficient. The petition further alleged that because of the mistakes in the policy, and because of the objections urged by the insurance company, neither appellee's testate nor himself could succeed in said action at law. Appellee prayed that the defendant company be restrained from further prosecuting the action at law until his suit in equity could be determined, that the action at law be stayed, and that the law action be transferred to the equity side of the court, and be consolidated with the suit in equity; that a decree be entered reforming the policy to conform to the agreement of the parties in respect to whom the loss was payable and also in respect

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to the description of the property, and that a judgment be entered in the amount found due, and for such other and further relief as equity might require.

To this petition an answer was filed by appellant, alleging, first, that the petition failed to state facts sufficient to entitle plaintiff to any relief; admitted the death of appellee's testate, Mary F. Fuller, and that appellee was her executor; admitted the destruction of the property by fire, and the commencement of the action at law upon the policy; but alleged that no mistake in the policy had been alleged in the proceedings at law; in addition, appellant pleaded that the policy in suit was the only one ever issued, and that when Mary F. Fuller brought her action at law thereon without alleging any mistake therein, she elected to treat the policy as valid in its present form, and that she and her executor were now estopped to plead or prove any mistake. Appellant further stated that it did not admit that Mary F. Fuller was the owner of the property on September 4, 1899, but alleged that whatever title she may have had, was kept from record from fraudulent and sinister motives, and that her interest in the property was wholly unknown to appellant, both at the time the policy was issued and at the time of the fire. The answer tendered back the premium received, and deposited the same in court subject to the order of appellee; alleged that no proofs of loss had been presented; that Mary F. Fuller had claimed the right to recover as sole legatee of the estate of W. C. Heddleson, and had presented proofs of loss in accordance with that claim, and both she and her executor were now estopped to change the grounds upon which she had based her claim and to allege that there was a mistake in the policy, concluding with prayer that the petition be dismissed.

For reply was filed what, for the purposes of this consideration, may be regarded as a general denial. Trial was had to the court, which resulted in general and special findings of the truth of all the allegations of the petition; the law action was revived in the name of appellee, as ex-

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scutor, and was consolidated with the suit in equity; the policy was reformed and judgment entered against appellant in the sum of \$1,361.80, and \$125 as attorneys' fees, the costs of the law action being taxed to appellee. The assurance company appeals.

It is urged in this court, first, that the petition failed to state facts entitling appellee to any equitable relief; second, that the proofs of loss furnished were insufficient, and third, that the evidence was insufficient for several reasons named to sustain the findings and judgment of the trial court. These contentions will be examined in the order stated.

The contention that the petition is insufficient seems to be based upon the fact that the petition shows that the action at law had already been brought upon the policy of insurance, and was still pending, and that this constituted an election to sue at law upon the policy as written, rather than to institute a suit in equity for the reformation of the policy. This contention, we think, can not be sustained. The two proceedings are not in any sense inconsistent. It is quite probable that appellee could not have recovered on the policy in question in an action at law without first procuring a reformation of the instrument. He therefore had a right to institute his equitable proceeding to procure a reformation and make the policy conform to the mutual intention of the parties. There can be no doubt that under the practice in this state, appellee might have filed an amended petition asking for a reformation of the policy and for a judgment thereon as reformed. But this must have been addressed to the equity side of the court, and would not differ essentially from what we now have in the case at bar. The contention that appellee in bringing the action at law elected to treat the policy valid as written can not be sustained. An examination of the petition filed in the action at law discloses that Mary F. Fuller pleaded that she was the sole owner of the property, and that the policy issued was issued for her sole use and benefit, so that the position of appellee has not been

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changed during the progress of the litigation in any material particular. Appellant has not changed its position, waived any of its rights, or been put in any worse position by the fact that appellee instituted this suit in equity to procure a reformation of the policy and a judgment thereon in the same proceeding. Nor has appellant in any way been prejudiced by the fact that appellee's testate commenced an action at law, inasmuch as the trial court taxed the costs of that action to appellee.

In this case, appellee's testate did not seek to proceed with her action at law when confronted with the answer filed by appellant, but a suit in equity was instituted asking to have the action at law stayed until a reformation of the policy could be obtained; that the two proceedings be consolidated, and a judgment entered for the amount found due on the policy after reformation. It is thus very apparent that the doctrine of the election of remedies can have no application to the facts in this controversy.

Appellant cites in support of its contention *Washburn v. Great Western Insurance Company*, 114 Mass., 175. It was there held: "One who files a bill in equity to reform a policy of insurance by striking out a clause of warranty, and who afterwards begins an action at law upon the policy as written, alleging compliance with the warranty and after a trial upon that issue has judgment rendered against him, has elected his remedy and waived his right to prosecute further his bill for the reformation of the policy." The case, we think, is distinguishable from that in hand. In that case, after an adverse decision upon the claim that he had complied with the clause of warranty, the plaintiff sought to prosecute his abandoned equity suit in order to show that he had never agreed to the provisions contained in the warranty. Manifestly, in fairness, he could not be permitted to do this. His conduct was clearly calculated to mislead and prejudice the defendant. He could not be permitted to say that he had complied with the warranty, and should therefore recover, until he found

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out that he had not complied therewith, and decision was rendered against him upon that claim, and then in another action seek to show that he had never agreed to the warranty. In the case at bar, on the contrary, the pleadings in the two proceedings are clearly made dependent upon and auxiliary to each other. In the equity suit it is sought to have the law action stayed until the policy in a proper proceeding could be made to conform to the facts, not facts contrary to but in harmony with those clearly disclosed in the petition in the law action. Neither appellee nor his testate at any time sought to base a recovery upon facts materially different from those alleged and found by the trial court to be true in the equity suit. It is, therefore, apparent that the case cited does not govern the case at bar. It follows that the contention that the petition in equity failed to state facts entitling appellee to equitable relief can not be sustained.

The contention that proofs of loss were insufficient must be disposed of adversely to appellant, because it is apparent from the pleadings in both actions, that appellant has from the outset and does still now deny all liability on the policy, for the reason that the estate of W. C. Heddleson, in whose name the policy was written, has no insurable interest in the property destroyed. It has been repeatedly held that notice of proofs of loss is waived, when the insurance company denies liability on the ground that the policy was not in force when the loss occurred. *German Insurance & Savings Institution v. Kline*, 44 Neb., 395; *Dwelling House Insurance Co. v. Brewster*, 43 Neb., 528; *Phoenix Insurance Co. v. Bachelder*, 32 Neb., 490; *Omaha Fire Insurance Co. v. Dierks & White*, 43 Neb., 473; *Aetna Insurance Co. v. Simmons*, 49 Neb., 811.

It is next contended that the proof is wholly insufficient to establish a mistake of fact, and that no mistake having been established, the trial court was powerless to reform the policy. Upon this question, Ernest Folsom, who was the agent of appellant, testified regarding his conversation with Mrs. Fuller, in part, as follows:

Q. State what conversation you had on the subject of how to write the policy?

A. In the rooms of the Oriental Hotel the conversation came about in this way: We had just settled up a loss which had occurred under some previous insurance, and I asked her how those proofs should be signed on the insurance under the former policies written in the name of W. C. Heddleson, and as I supposed written during his lifetime. He was dead and she represented his estate in the matter of settlement and adjustment, and she said, "I am the sole representative of my uncle, and he has left everything to me. I have his will here in my trunk." And consequently those proofs were made up and signed as the estate of W. C. Heddleson, deceased, by Mary F. Fuller, sole heir. Then we canceled one or two policies, and they were rewritten in the same way, and I asked her why she had never seen that the will was probated, and she said that she did not care to incur the expense; there was no other heir and whatever interest there was in the estate was hers. And consequently at the time Mr. Burr refers to, we were there settling another loss which occurred after the first one of which I spoke, and was not the one concerning which there is a controversy now. I said to her, "The insurance on your building will expire soon," and she said, "You will renew it, won't you?" and I said I would.

Appellee, who was a sub-agent for Folsom, and who wrote one of the policies on the same property at the same time, testified as follows:

Q. Among other properties you insured on the 5th of September, 1899, did you insure this same property?

A. On the 6th of September, yes, sir. If I remember right, that was the 6th.

Q. Who for?

A. For Mary F. Fuller. * * *

Q. After you wrote up that policy, what did you do with it, where did you go with it.?

A. I took this policy down to Folsom's office after I wrote it up. * * *

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Q. Now state what was said between you and Folsom.

A. I gave Mr. Folsom the policy, and he looked at it, and said, "Mr. Lansing, you have written this policy wrong." I said I did not. He said, "The estate of Heddleson." "No," I said, "Mary F. Fuller, she is the sole owner by will, deed and every other way, and if you have got your policies written any other way you ought to make an indorsement, and spend two cents, and inform the company of it, and there never would be any trouble hereafter." He said it did not make any difference which way this was written; it is all right any way. I said, "All right," and handed him the policy, and he paid me the commission or premium, because I had written the policy for him for Mary F. Fuller.

A. D. Burr, who was also an agent for appellant, and who at the time the policy was written was working for Folsom as sub-agent, and who was present with Folsom at the time he had the conversation with Mary F. Fuller, also testified that he knew the property belonged to Mrs. Fuller, and that in writing the policy he had renewed it in the same name as the preceding policy, viz., "The estate of W. C. Heddleson." Appellee's testate only had the policy a very short time before the fire occurred, and there is no testimony tending to show that she knew that the policy was written in the name of the estate of W. C. Heddleson rather than in her own name. It is clearly disclosed by the evidence that she informed the agents of appellant that she was the sole owner of the property, and that no one else had any interest therein. Folsom, the agent of appellant, fully understood that she owned the property, although he did not know that she had a deed, but supposed that she only had an unprobated will. But agent Lansing, who wrote one of the policies, informed Folsom that Mrs. Fuller was the owner of the property, not only under an unprobated will, but also by deed and "in every other way." So there can be no doubt that at the time the insurance was written, appellant, through its agents, knew the condition of the title, knew

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that Mrs. Fuller was the sole owner of the property, and it would seem could, therefore, by no possibility be deceived as to the insurable interest. We have then a situation in which both parties knew the actual state of the title, and were both in good faith attempting to consummate a valid contract of insurance thereon. Appellee's testate seems to have relied entirely upon the agent of appellant correctly writing the policy, having given him the exact facts. We are clearly of the opinion that the record discloses a case entitling appellee to equitable relief, and that a court of equity, under the facts stated, would grant reformation. We think, however, that the case as made, is more a mistake of law than one of fact. The parties seem not to have been mistaken as to where the title rested, but rather mistook the import of the language used, both seemingly being under a misapprehension as to which name the policy should run in.

In 2 Pomeroy, Equity Jurisprudence [2d ed.], section 845, it is said: "If on the other hand, after making an agreement, in the process of reducing it to a written form the instrument, by means of a mistake of law, fails to express the contract which the parties actually entered into, equity will interfere with the appropriate relief, either by way of defense to its enforcement, or by cancellation, or by reformation, to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact. In this instance there is no mistake as to the legal import of the contract actually made; but the mistake of law prevents the real contract from being embodied in the written instrument."

In *Maher v. The Hibernia Insurance Co.*, 67 N. Y., 283, it is said: "Where the complaint in an action upon a policy of fire insurance, sets forth facts showing that the parties were mistaken as to the effect of the language used, the averments are sufficient to authorize a reformation of the contract, although there is no direct allegation of a mistake of fact."

In the case at bar, even though it should be found that

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there is a failure of proof as to a mistake of fact, it is apparent that there was a misconception of the parties as to the legal import of the language used to effectuate the contract which they intended to make. There is no doubt, however, under the evidence, as to the actual contract, the contract which both parties had in mind, and it follows that equity has power to grant relief against the mistake. Throughout the trial, both appellee and appellee's testate persistently clung to the theory that the latter was the sole owner of the property insured, that appellant was aware of this fact and that she made no effort to conceal this fact, and we fail to discover anything in the proof to support the theory that by the commencement of the action at law, and its subsequent consolidation with the suit in equity, appellant was at any time placed at a disadvantage, or suffered any infringement of its rights.

It is finally contended that the court erred in taxing attorneys' fees in the sum of \$125 against appellant. In the case of *Lancashire Insurance Company v. Bush*, 60 Neb., 116, this court held that the section of the statute, section 45, chapter 43 [Annotated Statutes, section 6476], under which the trial court assessed this fee, was a valid exercise of the legislative power, and was constitutional, and we do not care to re-examine the question at this time.

After an examination of the entire record, we are convinced that the judgment of the trial court is right, and it is, therefore, recommended that the same be affirmed.

HASTINGS, C., concurs.

AFFIRMED.

Lansing v. Milwaukee Mechanics' Ins. Co. Dakota County v. Eastcott.

JAMES F. LANSING, EXECUTOR OF THE LAST WILL AND TESTAMENT OF MARY F. FULLER, DECEASED, APPELLEE, V. MILWAUKEE MECHANICS' INSURANCE COMPANY, APPELLANT.

FILED FEBRUARY 4, 1903. No. 12,174.

Commissioner's opinion. Department No. 1.

Insurance: CONTRACTS: REFORMATION IN EQUITY.

APPEAL from the district court for Lancaster county. Tried below before CORNISH, J. *Affirmed.*

Ricketts & Ricketts, for appellant.

Lionel C. Burr, Elmer E. Spencer and Willard E. Stewart, contra.

KIRKPATRICK, C.

The facts in this case are the same as those in the case of *Lansing v. The Commercial Union Assurance Co., Limited, ante*, page 140, an opinion in which is filed at this sitting. The judgment in that case ought to control the judgment in this.

It is therefore recommended that the judgment of the district court in this case be affirmed.

HASTINGS, C., concurs.

AFFIRMED.

DAKOTA COUNTY, NEBRASKA, V. R. P. EASTCOTT.

FILED FEBRUARY 4, 1903. No. 12,238.

Commissioner's opinion. Department No. 1.

- 1. Sheriffs and Constables: AUTHORITY TO EMPLOY GUARD: LIABILITY OF COUNTIES.** By the provisions of section 5, chapter 28, Compiled Statutes [Annotated Statutes, section 9031], the sheriff has authority to employ a guard for prisoners when actually necessary and, when such guard is necessary, the county is liable for his compensation at \$2 per day. *Gage County v. Kyd*, 38 Neb., 164.

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2. **Sheriffs and Constables: NECESSITY FOR GUARD: EVIDENCE SUFFICIENT.**
Evidence in this case held to support trial court's finding that a guard was necessary.

ERROR from the district court for Dakota county.
Tried below before GRAVES, J. *Affirmed.*

Wm. P. Warner, County Attorney, for plaintiff in error.

R. E. Evans, contra.

HASTINGS, C.

Defendant in error presented three accounts assigned to him by the sheriff of Dakota county for services as a guard at the jail while prisoners were in confinement. Each of the three accounts were rejected by the county commissioners; in each case an appeal was taken, and in the district court the three accounts were consolidated and were tried to the court. The answer of the county denied that there were prisoners in confinement in the jail during all of the time for which payment was claimed; denied that there was any necessity for the employment of a special guard during any of the time, and denied that the sheriff ever employed the plaintiff as a guard on behalf of the county, and alleges that if he had, the county would not be bound, as the sheriff had no authority to employ a guard. The trial court found in favor of the plaintiff and entered judgment against the county for \$295. From this judgment error is taken.

It is claimed that the court erred in admitting any evidence over the county's objection that no cause of action was stated in the petition; that the findings of the court are not supported by the evidence and are contrary to it and contrary to law, and that the judgment is not supported by sufficient evidence. The only questions, therefore, which need be considered, are the sufficiency of the petitions to state a cause of action, and the sufficiency of the evidence to sustain the finding.

The petitions sufficiently set forth the necessity of a

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guard and the employment of the plaintiff and the assignment of the sheriff's claim to him. They are objected to on the ground that they do not allege any authority from the county commissioners. But in the case of *Gage County v. Kyd*, 38 Neb., 164, it is held that the sheriff has control of the jail and that when extra guards are actually necessary, section 5 of chapter 28 of the Compiled Statutes of Nebraska [Annotated Statutes, section 9031], provides that the county shall pay \$2 a day for them.

The petitions seem to be sufficient and the only issue arising seems to be as to the necessity of such a guard. An examination of the bill of exceptions shows that the finding of the trial court is not entirely unsupported on this point. There were three different prisoners in the jail during the time covered by these claims. At one time during this interval efforts were made to effect an escape. The cage with metal bars inside the jail walls is of such a character that to prevent the cutting of the bars by an enterprising prisoner, it is necessary that some one remain within hearing. It is true that the principal function of this guard was to sleep in the sheriff's office immediately adjoining the jail. The claimant admits that he did not remain awake all of any night.

We are not prepared to say, however, that the finding of the trial court is not supported by evidence, and it seems clear that the intent of the statute was to give the sheriff power to provide for an emergency and make him responsible for its actual occurrence before incurring the expense permitted by the law.

It is recommended that the judgment of the district court be affirmed.

KIRKPATRICK and LOBINGIER, CC., concur.

AFFIRMED.

Day & Frees Lumber Co. v. Bixby.

DAY & FREES LUMBER COMPANY, APPELLANT, v. NOBLE W.
BIXBY ET AL., APPELLEES.

FILED FEBRUARY 4, 1903. No. 12,245.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: FINDINGS: DISPUTED QUESTIONS OF FACT.** The findings of a trial court upon disputed questions of fact will not be disturbed if sustained by sufficient competent evidence.
2. **Principal and Agent: AUTHORITY OF AGENT: LIABILITY OF PRINCIPAL.** In the absence of restrictions upon the agent's powers known to those who deal with him, his acts within the apparent scope of his authority will bind the principal.
3. **Principal and Agent: AUTHORITY OF AGENT: MECHANIC'S LIEN, WAIVER OF RIGHT TO: EVIDENCE SUFFICIENT.** Evidence examined, and *held* sufficient to sustain the finding that the agent had power to waive the right to a mechanic's lien.
4. **Appeal and Error: TRIAL BY JURY, RIGHT TO: REVIEW ON ERROR.** The question whether a party is entitled to a jury trial upon an issue presented by his pleading can not be determined upon appeal, but must be presented by petition in error.

APPEAL from the district court for Nuckolls county.
Tried below before LETTON, J. *Affirmed.*

W. F. Buck, for appellant.

F. H. Stubbs, contra.

KIRKPATRICK, C.

This is a suit brought in the district court for Nuckolls county by the Day & Frees Lumber Company against Noble W. Bixby and Wallace Bruce for the foreclosure of a mechanic's lien. The petition is in the usual form and discloses that Bixby owned certain lots in the town of Hardy in Nuckolls county; that Bruce was a contractor and had agreed to furnish materials and erect a building upon the lots. Bruce purchased the material from appellant and failed to pay therefor. An account in writing of the materials furnished to Bruce, the contrac-

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tor, was prepared by appellant as required by law and filed in due time. There is a prayer for foreclosure of the lien. An answer was filed by Bruce admitting all the allegations of the petition. The answer filed by Noble, the owner, admitted his ownership of the lots, the making of the contract with Bruce, and the erection of the building in accordance with the contract; and, in addition, pleaded that appellant's lumber yard, situated in the town of Hardy, was under the general management and control of one Charles Hayes, who resided at Hardy; that said Hayes had full authority to sell lumber and building material, for cash or on credit, and to file and waive the filing of mechanics' liens; that on or about August 21, 1900, while the building on the premises was in course of construction, the said Hayes, agent and manager of appellant, informed appellee Bixby, that he considered Bruce, the contractor, good for the payment of all material furnished to him for the erection of the building, and that appellant was looking to the said Bruce alone, and to no one else, for the payment of the account of materials furnished, and that appellant would not hold appellee Bixby, for the payment of the material or any part thereof; that acting upon this information appellee thereafter paid Bruce a large sum of money, aggregating about \$375, and much more than enough to satisfy the lien claimed by appellant; that except for the statement made by the agent and manager of appellant that it would look to the contractor alone for the payment of the material, appellee would have retained sufficient money in his hands for the purpose of satisfying the amount claimed as a lien by appellant. To this answer there was filed for reply a general denial.

Trial was had which resulted in a finding and judgment against appellant, decreeing that the mechanic's lien should be canceled of record. The cause is brought to this court upon appeal.

There is a sharp conflict in the evidence regarding the statement claimed to have been made by Hayes, the man-

ager for appellant. The testimony of Bixby upon this question is as follows: After stating that he had had a conversation with Hayes in the presence of Dr. Baugues in Hardy, he was asked to give the details of the conversation. He said:

"We walked across the street from the postoffice, across to my building which is opposite to the postoffice, and we commented on subjects in general during the passage across the street. We walked over to the front of this new building * * * and I stated to Mr. Hayes that I wanted to know—now, of course, I can't give you the exact language of this conversation.

Q. Go on and do it as near as you can.

A. I wanted to know whether they were looking to me or whether they were looking to Mr. Bruce, or whether they were going to hold me for the material going into the building purchased by Mr. Bruce. I stated to him that I was advancing money to Mr. Bruce right along, had been since the building was commenced, all that was due him at that time, and I wanted nothing against the building when it was completed. * * * Mr. Hayes stated to me that he considered Mr. Bruce good for the account. He stated that Bruce had a running account with them right along, and they considered him good. They did not want me to think that they were looking to me for the money, or expected to look to me. The matter was mentioned to me at that time, \$75, which Mr. Hayes said he would like to get to pay some freight with. As I had paid him a few dollars before that, an order for \$55, I stated that fact and told him that as much as there was nothing due Mr. Bruce, I did not feel like paying any further orders. I think the matter was mentioned, and he made some remark about Mr. Bruce burning the brick at Superior and selling them, and supposed he had money to pay them if they needed \$55, they could get it at Superior. If I remember correctly, he stated the account,—well, he said it was charged to Mr. Bruce. I do not remember whether he said the account was carried at their yard or not; I am not sure as to that.

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Q. Who did Mr. Hayes say to you that they looked to for their money?

A. He said they looked to Mr. Bruce,—and further, before I forget it—Mr. Hayes asked me to say nothing to Mr. Bruce about him asking me for that \$75.

Dr. Baugues, being called as a witness, testified to the conversation between Bixby and Hayes substantially in the same language. Hayes, called for appellant, denied positively ever having had the conversation, or of making the statement; and it was further claimed on behalf of appellant that Hayes had no authority to waive the filing of mechanics' liens.

The testimony shows that Bixby paid to Bruce after this conversation something like \$400, paying him in full for all that was due upon the contract. It is also shown that Hayes had charge of the lumber yard at Hardy belonging to appellant; that Day was president of the corporation, and resided at Superior and came to Hardy once or twice a week, and had the general supervision of the business. The trial court was justified in finding and no doubt did find that Hayes had general charge and control of the lumber yard of appellant situated at Hardy; and that he made the statement to Bixby, as already stated; and that Bixby, relying upon these statements, paid to Bruce the money in full for all that was due him.

It is contended on the part of appellant that Hayes as manager had no authority to waive the mechanic's lien in question.

We are of opinion that this contention can not be sustained. The undisputed testimony discloses that Hayes was advertised in the county papers as the manager of appellant's lumber yard at Hardy. It is further disclosed that he sold lumber for cash and on credit, as he saw fit; except that Day, the president of the company, testified that he did not usually sell lumber on credit exceeding the sum of \$200 without consulting him; and Hayes testified that he usually consulted Day before making sales on credit exceeding \$100. He also testified that

he prepared mechanics' liens and sent them to Day at Superior to file as he saw fit, but also, that where he thought the parties good, he did not in all cases make out mechanics' liens for filing. There is no testimony showing or tending to show that Bixby knew of any restrictions upon the authority of Hayes in the management of appellant's business. Appellant is a corporation and of course, can only act through its officers and agents. There can be no doubt that appellee had a right, under the circumstances, to assume that Hayes, the manager, had full control of appellant's business at Hardy. *Brown v. Eno*, 48 Neb., 538. Upon this point the case at bar seems to be in all material respects like that of *Whitelake Lumber Co. v. Stone*, 19 Neb., 402, which appellant concedes to be based upon sound principles. In *Lingonner v. Ambler*, 44 Neb., 316, it is said: "To create an estoppel *in pais*, the party in whose favor the estoppel operates must have altered his position in reliance upon the words or conduct of the party estopped."

In the case at bar, Bixby seems to have put the question directly to Hayes for the purpose of determining whether the company was selling the material on the credit of the contractor or was relying upon its right to a mechanic's lien. Hayes must have known the purpose of the inquiry, and that Bixby would rely upon his answer, and act accordingly. After his statement that they regarded the contractor good, that he had an account with them for a good while, and repeatedly paid his bills, and that they did not want Bixby to think that they were looking to him for the payment of the material furnished, it would be inequitable to allow appellant to change its position and insist upon its lien.

It is finally contended by appellant that under the issues presented by the answer, it was entitled to a jury trial. This contention can not be sustained. The record does not disclose that appellant demanded a jury trial; and even if request had been duly made and refused by the trial court, the correctness of the ruling could not be

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presented in this court upon appeal. The finding and judgment of the trial court seem to be in accordance with law, and it is recommended that the same be affirmed.

HASTINGS and LOBINGIER, CC., concur.

AFFIRMED.

THE FIDELITY MUTUAL FIRE INSURANCE COMPANY V.
JAMES P. LOWE ET AL.

FILED FEBRUARY 4, 1903. No. 12,298.

Commissioner's opinion. Department No. 1.

1. **Insurance: APPLICATION: PRINCIPAL AND AGENT: ENTRY OF FALSE ANSWERS BY AGENT: LIABILITY OF PRINCIPAL.** An agent for an insurance company, authorized to solicit insurance, and receive, fill out and transmit applications for insurance, binds the company which he represents in all knowledge received by him in the filling out of the application; and where an applicant in good faith states the answers truthfully, and the agent with knowledge of the facts, enters false answers, and the policy is issued thereon, the wrong of the agent will be imputed to his principal, and the company will be estopped by the statements of its agent.
2. **Insurance: MEMBERSHIP DURING NEGOTIATIONS: ACTS OF AGENT: LIABILITY OF PRINCIPAL.** The holder of a certificate of insurance in a mutual insurance company under the act of 1891, while in legal theory he is a member of the company, does not become such until the policy is issued; but during the negotiations for insurance, the agent of a mutual company stands upon the same basis as the agent of a stock company, and his acts are equally binding upon his principal.
3. **Insurance: APPLICATION: PRINCIPAL AND AGENT: POLICY: EFFECT ON PRIOR ACTS OF AGENT.** Persons dealing with an agent of an insurance company are not bound by latent restrictions upon his powers; nor can restrictions stated in the policy subsequently issued relate back to the acts of the agent in and about the preparation of the application for insurance.
4. **Trial: JURY, FUNCTION OF: WITNESSES: VERDICT: EVIDENCE: APPEAL AND ERROR.** The jury are the sole judges of the credibility of witnesses, and their verdict upon disputed questions of fact, if sustained by sufficient competent testimony, is conclusive.
5. **Insurance: ATTORNEYS' FEES: OBJECTION FIRST IN APPELLATE COURT.** In an action against an insurance company, under sections 43 and

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45, article 1, chapter 43, Compiled Statutes, 1899 [Annotated Statutes, sections 6474, 6476], the court upon application and after a hearing, adjudged that \$100 was a reasonable attorney's fee, and taxed the same against defendant, who thereupon filed objections, which were overruled. *Held*, That an objection urged for the first time on error in this court, that there was no proof that the fees taxed were reasonable, can not be considered.

6. **Appeal and Error: EVIDENCE: RULINGS ON ADMISSION.** Rulings of the trial court in the admission and exclusion of testimony examined, and *held*, not error.

7. **Appeal and Error: INSTRUCTIONS: RULINGS IN GIVING AND REFUSING.** Rulings of the trial court in the giving and refusal of instructions examined, and *held*, not erroneous.

ERROR from the district court for Jefferson county.
Tried below before LETTON, J. *Affirmed*.

Baldrige & DeBord, for plaintiff in error.

W. H. Barnes and John Heasty, contra.

KIRKPATRICK, C.

The judgment presented for review in this proceeding was obtained in the district court for Jefferson county by James P. Lowe and Thomas V. Lowe, a partnership, against the Fidelity Mutual Fire Insurance Company upon a policy of fire insurance issued September 17, 1899. By the terms of the policy the risk was made to cover property as follows: \$1,000 upon a frame building and additions thereto, and \$2,000 upon a stock of agricultural implements and other merchandise. The property was totally destroyed September 27, 1899. Plaintiffs allege the fact of insurance in defendant company, their compliance with the terms of the policy, the loss of the property by fire, and pray judgment accordingly, attaching a copy of the policy to the petition. In answer, defendant company pleaded that plaintiffs had falsely represented in their application the title to the property, the incumbrances thereon, and had falsely represented the value of the property insured. For reply plaintiffs stated that at

the time of the application, they had truthfully stated all facts inquired about to said company through its agent, one J. M. King, that the application was written out by King, who had full knowledge of the facts; that the application was signed by plaintiffs and delivered to King in the belief that King had full authority to write and take said application, and that if any false statements were contained therein, they were made by the defendant's agent; and that the defendant company was estopped to deny the validity of the policy by reason of any such false statements.

The defendant company prosecutes error, alleging that the court erred in the instructions given, and in the refusal of others, in overruling the motion for a new trial, and in taxing attorneys' fees of \$100 to defendant company, under section 45, article 1, chapter 43, Compiled Statutes, 1899 [Annotated Statutes, section 6476].

The testimony shows that at the time the application was written, the record title to the real estate was in James P. Lowe, and that there was an incumbrance of \$500 on the same. In the application the question relative to incumbrance on the real estate was not answered, and in the answer to the question of ownership it was answered that the lots were owned by James P. Lowe & Son. The plaintiffs testified that the answers had been truthfully made, while the agent testified that they were made as written. The question was purely one of credibility, to decide which was peculiarly the province of the jury, and the jury having found for plaintiffs, and the finding being supported by sufficient testimony, it will be considered final; and in the further consideration of this case, we will assume that plaintiffs gave the answers correctly, and that they were inserted as written by the agent with knowledge of the actual facts. This presents for consideration the question whether the defendant company may defeat the policy because certain representations with reference to title and incumbrance were falsely written in the application upon which it issued the policy,

notwithstanding such answers were written by one of its soliciting agents, to whom the actual facts were truthfully stated by the applicant.

The theory of defendant company at the trial was and is here that the agent had no authority to waive the requirement that the application should truthfully state the facts as to title and incumbrance, that the defendant company being a mutual insurance company under the laws of this state, had no power to waive such requirement, and that the plaintiffs, being members thereof, must be held conclusively to know that no waiver of any by-law of the company could be made by an agent thereof; that the by-laws were written in full upon the policy which they received, and that they, therefore, had actual as well as constructive notice of the limitations of the agent's powers; that they can not now recover because of a misrepresentation in their application material to the insurance risk.

The court instructed the jury that if the facts with reference to title and incumbrances were correctly revealed by plaintiffs to agent King, and that the statements in the application were written by King after this communication was made to him, the policy would not be void. At the request of defendant company, the court also instructed the jury that if they found that the plaintiffs had falsely represented the facts with reference to the title and incumbrance in the application, and that defendant relied thereon, they should find for defendant; the court, however, modifying the instruction by stating that it should be considered in connection with the one heretofore referred to. To the first an exception was taken by defendant, as well as to the second as modified.

We think the instructions were correct. Upon what principle of law or justice can defendant company avoid the policy because of a false answer in the application made, not by the insured, but by its own agent? Reserving for consideration later on the contention of defendant that there is a distinction between mutual companies organized under the laws of 1891, and stock companies, or

foreign insurance companies, and assuming for the present that no such distinction in fact exists, we think reason and authority unite in saying that defendant company is estopped to deny the validity of the policy because of the false statement entered knowingly by its own agent in the application. So far as the facts in this case go, the plaintiffs had a right to assume that the insurance company issued to them a policy intended by it to be valid, and issued with full knowledge as to the title and incumbrance. This is upon the theory that the knowledge of the agent is the knowledge of the principal. An exception to this elementary rule can not be sanctioned without the clearest reason therefor. It is a matter of universal knowledge that insurance companies, as their business is now transacted, deal with the public almost, if not exclusively, through agents. The labors of such agents are performed under the direction of, and for compensation paid by the company. The usual rules of the law of agency must apply. Third persons dealing with an agent are entitled to rely upon his acts done within the apparent scope of his authority. The principal can not plead a latent restriction upon his agent's authority, which the person dealing with him did not know, and had no reasonable incentive or opportunity to discover. Nor is the person dealing in good faith with such agent bound to assume that he is dishonest. On the contrary he may take it for granted that the agent will do his duty towards his principal, and the principal is thereby induced by self-interest to employ honest persons to represent him in his dealings with the public.

In this case the agent King was authorized to solicit insurance and fill out applications. In writing down the answers made by the applicant, he was acting under authority from his principal, and the applicant was not bound to see that he had written them correctly, he himself having made truthful answers. By giving a truthful answer to the agent, the applicant has discharged his duty to the company, and if the agent writes in a false answer,

his wrong will be imputed to the company, and it will be estopped to defend against liability because of the wrong of its own servant.

While there are some authorities holding to a contrary doctrine, the weight of authority supports the conclusion announced. In *Ætna Insurance Co. v. Simmons*, 49 Neb., 811, it is said to be the burden of the company to plead and prove that the answers were made as written. To the same effect is *Kettenbach v. Omaha Life Association*, 49 Neb., 812.

In *Stone v. The Hawkeye Insurance Co.*, 68 Ia., 737, 740, occurs this language: "The agent, in whatever he did about the preparation of the application, acted for his principal, the insurance company. He was empowered by it to prepare such applications for persons desiring insurance, and to forward the same to it. He wrote the application in question in the performance of the duties of his agency; and, if the company was deceived or misled by the statement in the application that the building was insured, this was in consequence of the negligent or wrongful manner in which he performed the duties of his employment, and it is consistent with justice, as well as the settled principles of the law, that the consequence of his wrong should be visited upon his principal rather than upon plaintiff, who was guilty of no bad faith in the transaction." Citing *Malleable Iron Works v. Phoenix Insurance Co.*, 25 Conn., 465. The reasoning in the *Stone Case* is sound and we think it applicable here.

In *Pickle v. The Phenix Insurance Co.*, 119 Ind., 292, it is said: "Where an agent, authorized by his company to take applications for insurance, writes false answers to questions contained in the application, without the knowledge and contrary to the directions of the applicant, who makes true answers to such questions, the company is estopped by the answers thus written by its agent." In the case last cited it was squarely held that the agent in taking the application and in writing down the answers was acting for his company, and his wrong must be im-

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puted to his principal. *Home Fire Insurance Co. v. Gurney*, 56 Neb., 306; *Home Fire Insurance Co. v. Fallon*, 45 Neb., 554; *Hartford Fire Insurance Co. v. Landfare*, 63 Neb., 559, 88 N. W. Rep., 779; *The Phenix Insurance Co. v. Allen*, 109 Ind., 273; *Rogers v. The Phenix Insurance Co.*, 121 Ind., 570; *Kausal v. Minnesota Farmers' Mutual Fire Insurance Ass'n*, 31 Minn., 17; *Lamb v. The Council Bluffs Insurance Co.*, 70 Ia., 238; *Crescent Insurance Co. v. Camp*, 71 Tex., 503; *Breckenridge v. The American Central Insurance Co.*, 87 Mo., 62; *Dunbar v. The Phenix Insurance Co.*, 72 Wis., 492; *The Aetna Live Stock Fire & Tornado Insurance Co. v. Olmstead*, 21 Mich., at page 252. In the last case cited, the late Judge Cooley said: "It can not be tolerated that one party shall draft the contract for the other, and receive the consideration, and then repudiate his obligation on the ground that he had induced the other party to sign an untrue representation which was, by the very terms of the contract, to render it void. * * *

"When an agent, who at the time and place is the sole representative of the principal, assumes to know what information the principal requires, and after being furnished with all the facts, drafts a paper which he declares satisfactory, induces the other party to sign it, receives and retains the premium moneys, and then delivers a contract which the other party is led to believe, and has a right to believe, gives him the indemnity for which he paid his money, we do not think the insurer can be heard in repudiation of the indemnity, on the ground of his agent's unskillfulness, carelessness, or fraud." To the conclusions thus cogently stated by Judge Cooley, we give our assent. It is the doctrine that has obtained long in this jurisdiction, and is sanctioned by many cases which might be added to those already cited.

It remains to be determined whether the contention of defendant company, that there is a recognized distinction between mutual companies organized under the provisions of chapter 33, Laws of 1891, sections 51 *et seq.*, chapter 43, Compiled Statutes, 1899 [Annotated

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Statutes, section 6506 *et seq.*], and stock companies can be sustained; the contention being that because of such distinction, the agents of the former class of companies do not stand upon the same basis as agents of the latter. It is said that stock companies deal with strangers, and mutual companies deal with their own members, who are charged with knowledge of the law applicable to such companies, and have actual notice thereof through the policy issued to the member. Some courts, it is true, have sought to rule strictly with reference to the authority of the agents of mutual companies, construing such authority in the light of the by-laws and charters of mutual companies. *Hale v. Mechanics' Mutual Fire Insurance Co.*, 6 Gray [Mass.], 169, 66 Am. Dec., 410; *McCoy v. Roman Catholic Mutual Insurance Co.*, 152 Mass., 272, 25 N. E. Rep., 289. It is not true, however, that this rule has been adopted by many courts and it is apparent that the tendency has been to hold that the agent of a mutual company is strictly and exclusively the agent of the company in all matters relating to the procurement of the policy, and the preparation of the application. The insured does not become a member in the mutual company until the policy has been issued to him. Therefore, prior to that time, he stands in the same relation to the mutual company as he would to a stock company, the distinction between them being one which the average man is not often qualified to recognize. It is true, that he must respect any restriction upon the agent's authority coming to his knowledge, or which he may be held to know; but until the policy issued, the soliciting agent of a mutual company is wholly the agent of the company, and the rights of the applicant are to be governed by the same rules which obtain in the case of stock companies. We believe the rule is well stated in *Eilenberger v. Protective Mutual Fire Insurance Co.*, 89 Pa. St., 464: "In a mutual insurance company membership dates from the consummation of a contract and not before. During negotiations for insurance, a mutual company occupies no other or better position than one

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organized on the stock plan, and can not profit by the fraud of its agent; for the membership arises from, but does not precede, the contract. As to all preliminary negotiations, the agent acts only on behalf of the company." *Columbia Insurance Co. v. Cooper*, 50 Pa. St., 331.

In *Kausal v. Minnesota Farmers' Mutual Fire Insurance Ass'n*, *supra*, speaking upon the contention that the distinction said to exist between stock companies and mutual companies results in a difference in the relative duties of applicant and company, it is said: "But in applying and contracting for insurance, the applicant and the company are as much two distinct persons as in the case of a stock company, and we see no reason for holding the agent who takes the application any less the agent of the insurer in the one case than in the other."

We conclude, therefore, that the agent in the case at bar, was the agent of the company, that knowledge on his part was knowledge of the company, and the conclusion follows that the execution of the policy with full knowledge of the existing facts, which by the conditions of the policy rendered it void, is a waiver of those conditions. Otherwise the company would be permitted to enjoy the benefits of a contract indefinitely, upon which it never intended to pay a loss, because invalid when issued. *Liverpool and London and Globe Insurance Co. v. Ende*, 65 Tex., 118.

It can not be contended that plaintiffs were bound to make a revelation to defendant company as to the title and incumbrance subsequent to the receipt of their policy, which contained stipulations as to the manner in which waivers could alone be valid and binding on the company. As already remarked, they were entitled to assume that the agent had done his duty, and had written the answers as made by them and that anything he had done with reference to the application was within the scope of his authority. But, at all events, they could not be bound by a restriction upon the agent's authority, notice of which came to them through the policy subsequently issued.

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In *Crouse v. The Hartford Fire Insurance Co.*, 79 Mich., 249, it is held: "A restriction in an insurance policy upon an agent's authority can not be construed to refer to his acts or knowledge prior to the delivery of the policy."

The acts of the agent within the apparent scope of his authority at the time he acts will bind the company. *The Niagara Insurance Co. v. Lee*, 73 Tex., 641.

In *Eilenberger v. Protective Mutual Fire Insurance Co.*, *supra*, it is said: "A company contracting by its agent will not always escape the consequences of the fraud or mistake of its agent, by inserting a stipulation in the policy that such agent shall be deemed the agent of the insured, who, at the time of applying for the policy, was ignorant of the insurer's intention so to stipulate."

Nothing herein is intended to qualify or modify the doctrine established in this court that where a policy provides that no waiver of any of its conditions will be valid until "the same be indorsed in writing on the policy and signed by the president or secretary at the home office only," as provided in the policy under consideration, it will not be permitted to a party to show waiver by other or different modes. *German Insurance Co. v. Heiduk & Skibowski*, 30 Neb., 288. It can not be said, however, that a false answer inserted in the application by the agent of the company contrary to the directions of the applicant is a violation by the applicant of the stipulation in the policy just referred to. *Hartford Fire Insurance Co. v. Landfare*, *supra*, and cases cited. The plaintiffs having told the company the truth with reference to facts inquired about, they were absolved after receipt of the policy from any obligation to discover whether it had been issued in violation of the terms therein contained. It might be further remarked that the ordinary stipulation in a policy against liability in case of failure of title is to guard against the moral hazard, the theory being that the insured, not owning the property, but the loss, if it occurs, payable to him, would be tempted to commit a fraud upon the company. The same is true of incumbrances. In this

case it appears that the record title was in James P. Lowe, while the insurance ran in the name of James P. Lowe & Son. Under this state of facts, it would scarcely seem that the interest of the insured and that of the owner of the record title were very widely divergent.

We can not agree to the contention that the proof fails to sustain the finding that the value of the property was not materially misrepresented. Values are largely matters of opinion. The testimony as to the value of the property destroyed is amply sufficient to sustain the verdict.

The lower court allowed \$100 attorneys' fees to plaintiffs under the provisions of section 45, chapter 43, Compiled Statutes [Annotated Statutes, section 6476]. It is contended on the authority of *German Insurance Co. v. Eddy*, 37 Neb., 461, 462, that such allowance can only be made upon proof as to what constitutes a reasonable fee in the case, and that in the case at bar there is a failure of proof in this regard. From the record it appears that judgment was rendered for plaintiffs in the sum of \$3,192.50, "as by said verdict so found, and their costs herein expended, taxed at \$59.15." An application by plaintiffs was made for the allowance of attorneys' fees, and the record recites, "the said judgment herein above mentioned is hereby set aside, to which defendant excepts, and a hearing had on said application for the allowance of attorneys' fees; on consideration whereof the court finds that \$100 is a reasonable allowance," etc. Defendant company filed objection to this action of the court, stating that the court was without jurisdiction in that the rendition of the judgment was a violation of constitutional right, as an attempt to take the property of defendant without due process of law. We think that under the record it is too late for defendant company to urge that the allowance of the fee was made without proof as to its reasonableness. It appears that a hearing was had, and that defendant was present thereat. Error in the action taken by the trial court does not affirm-

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atively appear, and it does not appear that defendant at that time called to the attention of the court its objection now presented.

Was there error in the admission and exclusion of evidence? Briefs of counsel for both parties are meagre in their discussion of these assignments. It is contended that the court erred in the admission of the policy sued on because not identified and no proper foundation laid. We do not think this was error. The answer admitted the execution and delivery of the policy.

Error is claimed in the admission of testimony as to the conversations had between the insured and the company's agent, King, when the application was written, calculated to show that the applicant stated the facts with reference to title and incumbrance. This was clearly admissible under the issues as joined, and was not a violation of the rule inhibiting the variation or qualification of written contracts by parol. The written application was impeached by the reply of plaintiffs.

Error is claimed in the exclusion of certain testimony offered to show that some of the personal property was held by plaintiffs on commission. The evidence, we think, shows with sufficient certainty that the goods destroyed which belonged to plaintiffs exceeded the amount of the insurance thereon, and the exclusion of this testimony cannot be said to be prejudicial.

Errors claimed with reference to instructions given and refused have already been sufficiently considered, and need not be further mentioned.

We have carefully examined the record in this case, and are convinced that the proceedings had at the trial in the lower court are free from error prejudicial to the rights of defendant company. Hence it is recommended that the judgment be affirmed.

HASTINGS, C., concurs.

AFFIRMED.

Miles v. Ballantine.

WILLIAM H. MILES ET AL. V. DAVID COULTER BALLANTINE
ET AL.

FILED FEBRUARY 4, 1903. No. 12,320.

Commissioner's opinion. Department No. 2.

1. **Continuance: DISCRETION OF COURT: TRIAL.** An application for a continuance is addressed to the sound discretion of the trial court, and unless it appears that there has been an abuse of such discretion, its ruling will not be disturbed.
2. **Continuance: DISCRETION OF COURT: TRIAL.** Where, by the rules of the trial court, it is provided that applications for continuances must be filed on or before the first day of the term, and where it appears that such application is not filed until the cause is called for trial, and in the application itself it is not shown that the applicant has used reasonable diligence to procure counsel, and obtain the testimony of witnesses whose evidence he alleges is necessary to enable him to proceed to trial, it is no abuse of discretion to overrule the application.
3. **Judgment: RES JUDICATA: PARTIES AND SUBJECT-MATTER IDENTICAL.** Where the claim or demand involved in a suit is identical with the claim or demand in a former action, and the parties to both suits are practically the same, the judgment in the former action constitutes an absolute bar to the prosecution of the latter.
4. **Ejectment: JUDGMENT, CONCLUSIVENESS OF: TWO TRIALS.** With the exception that parties are entitled to two trials in ejectment suits, the judgments in such actions are as conclusive as in any other. *Bryant v. Estabrook*, 16 Neb., 217.
5. **Judgment: RES JUDICATA: INSTRUCTION PROPER: EJECTMENT. Held,** That an instruction by which the jury were told that the judgment in a former suit, which was introduced in evidence, was binding upon the plaintiffs, and was a bar to their prosecution of this suit, was properly given.
6. **Judgment: RES JUDICATA: COLLATERAL ATTACK: EVIDENCE IMPEACHING: EJECTMENT.** The court having jurisdiction of the parties and the subject-matter in a former action, the judgment therein is conclusive and is not subject to collateral attack when introduced in another proceeding involving the same matters between the same parties, and evidence offered for the purpose of impeaching its validity was properly excluded.
7. **Ejectment: RENT: VERDICT NOT EXCESSIVE.** Evidence examined, and *held* that the amount of the verdict for rents and profits of the real estate in question was not excessive.

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ERROR from the district court for Frontier county. Tried below before NORRIS, J. *Affirmed.*

S. A. Searle, for plaintiffs in error.

W. S. Morlan, *contra.*

BARNES, C.

David Coulter Ballantine and Ena Ballantine, defendants in error herein, commenced this action in the district court of Frontier county against William H. Miles and Nellie E. Miles, to recover possession of certain real estate situated in that county. To that end they filed their amended petition in said court on the 18th day of November, 1899. The first cause of action set forth in said petition was stated in the usual form of an action in ejectment; the second cause of action was for the recovery of the rents and profits of the said lands, amounting as alleged to the sum of \$100; the third cause of action set forth matters in the nature of commission of waste on the premises, and among other things an injunction was prayed for restraining the defendants from cutting and destroying the timber growing on the land, and from destroying the fences which inclosed it. On the 8th day of December, 1899, the defendants filed their answer, which was in the nature of a general denial; and it was further alleged in the third paragraph thereof that prior to the month of February, 1880, one Dempsey B. Palmer was the owner in fee of the premises described in the plaintiffs' petition; that during the month of February, 1880, he departed this life seized of said premises, and left as his heir at law and lineal descendant the defendant William H. Miles, who, upon the death of said Dempsey B. Palmer, took possession of said land and has ever since said time and up to the 14th day of April, 1899, been in open, notorious, exclusive and adverse possession of said real estate, and has

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during said time continuously made lasting and valuable improvements thereon which still exist. To this answer plaintiffs filed a reply, in which they admitted that Dempsey B. Palmer was, during his lifetime, the owner of the real estate described in their petition, and that he died seized of said premises; and alleged that if, on his death, he left surviving him as his heir at law and lineal descendant, William H. Miles, which fact the plaintiffs denied, that the said defendants William H. Miles and Nellie E. Miles are estopped from setting up or relying upon such fact to establish their claim to the right of possession or the title to said real estate; because—

First. On the death of the said Dempsey B. Palmer his estate was duly administered in the county court of Frontier county; that upon the administration of said estate it was, on the 22d day of June, 1880, found, determined and decreed by said court that one Anna E. Ballantine, the mother of the plaintiffs, was the sole and only heir of said Dempsey B. Palmer deceased, and that she was entitled to the real estate described in their petition, all of which proceedings of the said court were had with full notice to and knowledge of the defendants, and were by the said defendants assented to and ratified; that said judgment and decree is still in full force and effect, unreversed and wholly unmodified, and the matters and things thereby determined are *res judicata*.

Second. In an action pending in the district court of Frontier county, Nebraska, wherein defendant William H. Miles was plaintiff, and George W. Ballantine, administrator of the estate of Anna McCleary, deceased, Ena Ballantine and Coulter Ballantine, minor heirs of Anna McCleary, deceased, to wit, these plaintiffs, were defendants; which suit was brought by said William H. Miles to recover the title to the real estate described in the petition of the plaintiffs herein, and in which the defendants, to wit, the plaintiffs herein, in said action by way of cross-petition, sued to recover the said premises, and also for the recovery of the rents and profits of said premises

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during the time said William H. Miles was in possession thereof, on the 28th day of September, 1886, it was duly adjudged and decreed by said court that defendants in said action, the plaintiffs herein, were entitled to the possession of said real estate, and that they recover of the plaintiff therein the real estate described in the petition of the plaintiffs in this case; and further that the defendants in said action recover of the said William H. Miles, plaintiff therein, the sum of \$300, the rent and use of said premises from the time he commenced to occupy the same to the time of the rendition of the decree; and that said judgment and decree is still in full force and effect, unreversed and wholly unmodified, and the matters and things therein determined are *res judicata*.

Third. That if the defendants have been in possession of the real estate described in plaintiffs' petition during all of the time alleged in the answer of the defendants, which plaintiffs deny, yet plaintiffs' action is not barred by the statute of limitations, for the reason that at the time the cause of action accrued to them David Coulter Ballantine was a minor, and continued to be a minor until the 21st day of August, 1897, on which date he attained his majority by becoming twenty-one years of age, and the plaintiff, Ena Ballantine, was a minor and continued to be a minor until the 24th day of February, 1899, at which time she attained her majority by becoming eighteen years of age.

Fourth. Plaintiffs denied each and every allegation contained in the answer not specifically admitted.

Upon these issues the cause was tried to a jury and a verdict was rendered in favor of the plaintiffs (defendants in error), and from that judgment the case is brought to this court for review.

Plaintiffs in error contend that the court erred in overruling their application for a continuance. It appears that the amended petition herein was filed in November, 1899, that the answer was filed in December following, and the reply was filed on December 23d, so that the issues

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were made up and the cause was ready for trial in December, 1899. The first trial was had at the following April term of said court and resulted in a verdict and judgment for the plaintiffs, which was set aside and a second trial granted on the application of the defendants. At the October term of the court for the year 1900, and on the first day thereof, the cause was assigned for trial. On the following day the plaintiffs in error made an application for a continuance based on certain affidavits. It was alleged in the affidavit of William H. Miles that one Tanner was his counsel in the case and was in sole charge of it until August 18, 1900, at which time, owing to differences arising between them he discharged the said Tanner from further employment in the case, and on account of illness he had not been able to procure other counsel until the first day of the term, at which time he employed one S. A. Searle to act in that capacity for him; that he was informed by said Searle that it was impossible for him, the said Searle, for want of time, to properly examine the questions involved in the case, and prepare for trial at that term. He further alleged that it was necessary for him to have certain persons whom he named as witnesses, and whom he alleged, if present, would testify that he had been in open, notorious, adverse and exclusive possession of the premises for more than ten years next before the commencement of the action; that they were absent from the county; that one of said witnesses was in the state of Illinois, and as to the other two their whereabouts were unknown; that the same facts could not be shown by the testimony of any other witnesses. This affidavit was supplemented by the affidavit of S. A. Searle, who alleged that for want of time it was impossible for him to properly prepare the case for trial at that term of court. On motion of the plaintiffs this application and the affidavits accompanying it, were stricken from the files, and the motion for a continuance denied. It appears further from the record that one Graham was also one of plaintiffs' attorneys, and it does not appear that he had been dis-

charged or was in any way incapacitated from serving as counsel in the case; an examination of the affidavits discloses that no diligence whatever was exercised by the plaintiffs to procure other counsel, although they had discharged Tanner as they allege, about two months before the case was set for trial. No diligence was shown on their part in attempting to obtain the testimony of absent witnesses; no reason was shown why their depositions had not been taken, and as to the two witnesses whose whereabouts were unknown, there was no showing that their testimony could be procured at a future time. Again it appears that by the rules of practice in force in the trial court, one who desires a continuance of his case must file his application on or before the first day of the term. It does not appear that the rule is an unreasonable one. The question of refusing or allowing a continuance is left largely to the discretion of the trial judge. In this case a careful examination of the application and affidavits convinces us that there was no abuse of discretion in striking the application from the files and refusing the continuance of this case. Therefore the action of the trial judge in that behalf is affirmed. *Stratton v. Dole*, 45 Neb., 472, 63 N. W. Rep., 875; *Storz v. Finklestein*, 48 Neb., at page 31, 66 N. W. Rep., 1020; *Burris v. Court*, 48 Neb., at page 181, 66 N. W. Rep., 1131.

After the motion for a continuance was overruled a jury was empaneled and the trial proceeded. An examination of the record and bill of exceptions discloses that there was practically no limit imposed upon the parties as to the introduction of evidence. All of the testimony offered, or nearly all of it on both sides, was received. It appears that one Dempsey B. Palmer, in the year 1880, died seized of the premises in question; that he left surviving him Anna Ballantine, a daughter, who was the mother of David Coulter Ballantine and Ena Ballantine, the defendants in error herein; that in due time the estate of the said Dempsey B. Palmer was administered; that such proceedings were had in the county court of Frontier

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county; that the said Anna Ballantine was adjudged to be the sole heir at law and lineal descendant of the said Dempsey B. Palmer, and as such she inherited the real estate in question herein. Due notice of this proceeding appears to have been given, and it further appears that the plaintiffs in error at that time resided in the said county, and had full knowledge thereof; that the first time William H. Miles ever claimed to be the son and lineal descendant of Dempsey B. Palmer was in his answer in this case. It further appears that after the death of Ballantine, the husband of Anna Ballantine, she was married to one McCleary, and she is spoken of in the proceedings herein as Mrs. Anna McCleary. It further appears that on the 15th day of February, 1886, the plaintiff in error, William H. Miles, commenced an action in the district court of Frontier county against George Ballantine as administrator of the estate of Anna McCleary, deceased, Ena Ballantine and Coulter Ballantine, minor heirs of said Anna McCleary, deceased, defendants; the said Coulter Ballantine and Ena Ballantine being the plaintiffs in this action, to recover the title and possession of the premises in question herein, and quiet the title thereof in himself. The defendants in that action (the plaintiffs in this one), filed their answer to the petition and denied the allegations contained therein, and by way of a cross-petition alleged that Anna E. McCleary died seized in fee simple of the title to the real estate described in their answer and cross-petition; that she left surviving her as her sole heirs at law, Ena and Coulter Ballantine, both of whom are minors; and that George Ballantine was duly appointed administrator of the estate of the said Anna E. McCleary, deceased, and that he was legally acting as such; that William H. Miles, the plaintiff, is unlawfully in possession of the real estate described in the petition, and of which Anna E. McCleary died seized; that defendants are informed and believe that said William H. Miles got possession of said real estate by some pretended contract

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which, if ever made, was void and of no effect, and is of no binding force against George Ballantine, as administrator of the said estate of these minor heirs, all of whom are made defendants in this action; that plaintiff has been in possession of the real estate heretofore described for the period of more than two years last past, reaping the benefits therefrom, and that the rental value thereof during said period is \$250 per annum.

To this answer Miles filed a reply denying each and every allegation contained in the cross-petition.

It further appears that this case came on for trial on the 28th day of September, 1886, and resulted in the following judgment:

"This cause came on to be heard upon the petition, answer, reply and the evidence; Washington L. McCleary was sworn and examined upon the part of the plaintiff. Thereupon on this day the plaintiff dismissed his action; plaintiff having dismissed his petition this cause came on to be heard upon the cross-petition of the defendants, the reply and the evidence and was submitted to the court, on consideration whereof the court finds that there is due from the plaintiff to the defendants upon their cross-bill and counter-claim the sum of \$300. The court further finds that the plaintiff, William H. Miles, is wrongfully in possession of the real estate set out in the petition and answer in this action, to wit: the northeast quarter of the northeast quarter of section 12, and the southeast quarter of the southeast quarter of section 1, township 7 north, range 28 west, and lot 1 in section 7, and lot 7 in section 6, in township 7 north, range 27 west, in Frontier county, Nebraska, and that the defendants are entitled to the immediate possession of the same. It is therefore considered by the court that defendants recover of the plaintiff the sum of \$300, the rent and use of the said premises from the time the plaintiff commenced to occupy the same up to the present time; and it is further considered, ordered and decreed by the court that defendants recover from the plaintiff the real property described in the peti-

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tion and answer aforesaid, and that a writ issue to the sheriff of this county requiring him to put the defendants in possession of said premises."

The pleadings and judgment in said cause were read in evidence and testimony was introduced on the part of the plaintiffs in error tending to show that Miles had been in possession of the premises ever since about the year 1884, when he alleged he purchased them from Anna E. McCleary, and took possession thereof under such agreement of purchase. On the other hand evidence was introduced by defendants in error which tended to show that Miles recognized their title and right to the premises; that he accepted a lease of the land made by Coulter Ballantine for the year 1898; that the hay on the land had been cut another year by a party who shipped it to Coulter Ballantine at Denver. There was a conflict of evidence on the question of adverse possession. The plaintiff in error, William H. Miles, also testified that he was a son of Dempsey B. Palmer, but admitted that Anna Ballantine, afterwards Anna McCleary, was his sister, and a daughter of Dempsey B. Palmer; he also testified that he purchased the premises in question from his sister, Anna McCleary. After hearing all the evidence, the court on his own motion, instructed the jury as follows:

"This is an action of ejectment in which the title and possession of the real estate described in the petition is at issue.

"Plaintiffs claim to be the owners in fee simple of the land and to be entitled to the immediate possession of the same, and also claim that the defendants are indebted to them for the use and occupation of the said real estate from the first day of January, 1899. There has been no dispute in the testimony that the plaintiffs are the heirs of the daughter of Dempsey B. Palmer, who received a patent for this land from the United States government and who died intestate, never having sold or disposed of the land in question. The defendant, William H. Miles, claims title by virtue of what is known in law as adverse

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possession, also claims to be a son of said Palmer and a brother of the mother of plaintiffs in this action. There has, however, been introduced in evidence the record and pleadings in a case commenced by William H. Miles against the plaintiffs in this suit and the administrator of their said mother's estate; the judgment in that case, by which the defendant herein is conclusively bound, decreed that the plaintiff William H. Miles, had no title, right or interest to the said land, and the defendant William H. Miles, if he has any interest in the real estate in dispute must have acquired the same since the rendition of the judgment in the case referred to, to wit: September 28, 1886. This therefore disposes of any claim that defendant William H. Miles, may have had to said real estate, or to the title of the same by reason of his alleged claim of being an heir of the said Dempsey B. Palmer. In order to obtain title by adverse possession, one of the elements necessary is that such possession must have existed for ten years prior to the bringing of the suit, inasmuch as the plaintiffs herein upon the 28th day of September, 1886, were both minors the statute could not and did not commence to run against them and in favor of the defendant William H. Miles until they had arrived at their majority, and the evidence is undisputed that ten years had not elapsed since the oldest of plaintiffs became of age until the commencement of this suit. Therefore the defendant, William H. Miles, could not have obtained title by adverse possession, and it follows that as far as the title and possession of this land is concerned your verdict must be in favor of the plaintiffs.

"This leaves but one question for your consideration, to wit: What was the reasonable rental value of the premises in dispute from the first day of January, 1899, the time from which the plaintiffs claim and defendants admit that the defendants have been in possession of said real estate?"

This instruction was excepted to by the plaintiffs in error, and they now claim that the court erred in giving it. We might as well dispose of that question at this time

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because if the instruction was properly given it will be unnecessary to consider the other assignments of error contained in the plaintiffs' petition.

It appears from the record that the identical question in dispute in this case, to wit, the ownership and right of possession of the land in controversy, was in issue in the case of William H. Miles against the defendants in error and the administrator of their mother's estate, and was disposed of by the judgment of September 28, 1886. It is true that Nellie E. Miles, one of the plaintiffs herein, was not a party to that action; but it appears that she claims no interest in the premises except such as she may possibly acquire by reason of the fact that she is the wife of William H. Miles, so that the parties in the two suits are practically the same.

It also appears that some time after the rendition of the decree in the former suit the plaintiff filed a petition for a new trial, which was denied by the court; that no appeal was ever taken from the original judgment, or from the order of the court denying the petition for a new trial. So that the judgment of September 28, 1886, is in full force, unreversed and unmodified. Such being the situation the plaintiffs in error are bound by that judgment and can not attack it collaterally in this action. *Gayer v. Parker & Son*, 24 Neb., 643; *Slater v. Skirving*, 51 Neb., 108; *Maryott & McHurron v. Gardner*, 50 Neb., 320; *Ayres v. Duggan*, 57 Neb., at page 753; *State v. Buffalo County*, 6 Neb., at page 461.

It is not claimed that the parties and the issues in the two actions are not practically the same, but it is contended that because the judgment was rendered on the cross-petition of the defendants, which was in effect a petition in ejectment, it is not a bar to the prosecution of this action. Whatever may be the rule in other jurisdictions, the holdings of this court are that judgments in ejectment suits are as conclusive between the parties as in any other actions. *Bryant v. Estabrook*, 16 Neb., 217; *Chase v. Miles*, 43 Neb., 686; *Gregory v. Kenyon*, 34 Neb., 640.

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In the case last cited the facts are quite similar to those in the case at bar. That was a case wherein the decree relied upon as an adjudication was rendered in favor of the defendant upon his cross-petition and in the subsequent proceedings involving the title to the same property, it is held that such decree was a complete bar to the action.

We therefore hold that the plaintiffs in error are bound by the former judgment, and that the instruction complained of was properly given.

It is claimed that the court erred in refusing to allow the plaintiffs herein to testify that the reason their bill in the former action was dismissed after the trial was entered upon, and why they should not be bound by the judgment, was that William H. Miles was absent from the state at the time of the trial. This testimony was properly excluded. The record of a judgment regular on its face in a case in which the court rendering it had jurisdiction imports absolute verity until modified or reversed in a direct proceeding, and cannot be attacked collaterally. Such record may be made up in an action of ejectment upon the first trial, unless the losing party shall, during the term, apply to have the verdict set aside and for a new trial. After the adjournment of the term the judgment on the first trial in an action in the nature of ejectment is final. *Bryant v. Estabrook*, *supra*; *Chase v. Miles*, 43 Neb., 686; *Stenberg v. State*, 48 Neb., at page 316. A party to a proceeding in the district court where such court has jurisdiction over the parties and the subject-matter of the action will be bound by the judgment in such case when collaterally attacking it, even though jurisdiction was irregularly or erroneously obtained. *Hilton v. Bachman*, 24 Neb., 490.

When the court has jurisdiction of parties and the subject-matter, no defect, error or irregularity, either in the pleadings or proceedings, will affect the conclusiveness of the judgment when attacked collaterally. *Taylor v. Coots*, 32 Neb., 30.

It is urged that the judgment for \$85 for rents and

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profits is excessive, and is not sustained by the evidence. An examination of the record discloses that there was evidence upon which the jury might have found a verdict for \$100 instead of \$85.

We deem it unnecessary to determine any of the other questions raised by the record. It is apparent to us that the jury in this case could not lawfully have found any other verdict. This being true if there was any error committed by the trial court in receiving or rejecting evidence it was error without prejudice.

We therefore recommend that the judgment of the district court be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

CHARLES BIRD, APPELLEE, v. JAMES H. MCCREARY, APPELLANT, ET AL., IMPEADED WITH CLARENCE A. STARR, APPELLEE.

FILED FEBRUARY 4, 1903. No. 12,385.

Commissioner's opinion. Department No. 3.

1. **Mortgages: FORECLOSURE: APPRAISAL: OBJECTIONS TOO GENERAL.** In the sale of real estate, under a decree of foreclosure, an objection that the appraisement "is irregular and not in accordance with law," is too general to merit consideration.
2. **Mortgages: FORECLOSURE: APPRAISAL: VALUE: EVIDENCE SUFFICIENT.** Evidence on the question of the value of the premises examined, and held sufficient to uphold the appraisement.

APPEAL from the district court for Douglas county.
Tried below before EVANS, J. *Affirmed.*

W. H. De France, for appellant.

Switzler & St. Clair, contra.

ALBERT, C.

This is an appeal from an order of the district court confirming a sale of real estate under a decree of fore-

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closure. Before the sale was made, the appellants filed a motion to set aside the appraisement, which was overruled and, as all complaints of the order of confirmation are based on the grounds urged in that motion, the only question presented is whether it was properly overruled. If it were, the order should be affirmed, if not, it should be reversed.

The objections urged against the appraisement in the motion are in effect, that the property was appraised too low, and "because said appraisement was otherwise irregular and not made in accordance with law." As to the second objection, it is too general, and the court properly overruled it. *Ecklund v. Willis*, 44 Neb., 129. As to the first, the valuation placed on the property by the appraisers is \$4,500. In support of the motion, the appellants filed six affidavits, in which the valuation ranges from \$5,800 to \$8,000, the average being \$6,378. No counter affidavits were filed.

In *Nebraska Loan & Building Association v. Marshall*, 51 Neb., 534, this court held in effect, that the appraisement is equivalent to the testimony of three witnesses as to the value of the property. In *Cole v. Willard*, 62 Neb., 839, the value, shown by the affidavits, was \$4,240, while the appraised value was but \$2,800, or about 66 per cent. of the value shown by the affidavits, yet this court refused to set aside the appraisement. In the present case, the disparity between the appraised value and the value as shown by the affidavits is not so great as in the case last cited; besides, in this case the court was dealing with a second sale of the same property. We think the order of the district court was right, and recommend that it be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

First Nat. Bank of Sutton v. Ashley.

THE FIRST NATIONAL BANK OF SUTTON, NEBRASKA, AP-
PELLEE, v. WILLIAM H. ASHLEY ET AL, APPELLANTS.

FILED FEBRUARY 4, 1903. No. 12,417.

Commissioner's opinion. Department No. 3.

1. **Appeal and Error: TIME FOR PERFECTING: RECEIVER.** To give this court jurisdiction to review an order of the district court appointing a receiver, the appeal must be perfected within six months from the entry of the order.
2. **Receiver: OBJECTIONS TO APPOINTMENT: HOMESTEAD: ABANDONMENT: RETRIAL OF OBJECTIONS ON MOTION FOR DISCHARGE.** An application for the appointment of a receiver was resisted on the ground, among others, that the premises sought to be placed in charge of the receiver was the homestead of the defendants. One of the issues tried was the abandonment of the homestead by the defendants and the court found in favor of the plaintiff and appointed a receiver with directions to take possession of the premises. Subsequently the defendants moved the court for an order discharging the receiver on the sole ground that the premises placed in his charge was their homestead. *Held*, That the question of the homestead right of the defendants having been determined on the hearing for the appointment, it could not be again raised on a motion to discharge the receiver and that the court properly denied the motion.

APPEAL from the district court for Clay county. Tried below before STUBBS, J. *Affirmed*.

Wm. M. Clark, for appellants.

Thomas H. Matters, contra.

DUFFIE, C.

The First National Bank of Sutton, Nebraska, held a mortgage on 160 acres of land owned by the defendants. A foreclosure of the mortgage, with other mortgage liens existing on the premises, was had, sale made and confirmed, and an appeal taken to this court by the defendants from the order confirming the sale. Pending that appeal, and on the 16th day of June, 1900, the bank applied for the appointment of a receiver to take possession

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of the mortgaged premises. The defendants resisted the appointment of a receiver, setting up among other matters that said premises was their homestead. The court evidently found against them upon this question, and on the 22d day of June, 1900, entered an order appointing David Cassell receiver for the premises. On the same day, to wit: June 22, 1900, the Ashleys filed a motion to discharge the receiver upon the ground that "the land, to wit: the northeast quarter of section 5, township 5 north, range 5 west of the 6th P. M. in Clay county, Nebraska, and which the receiver was appointed to take charge of, is the homestead of these defendants, William H. Ashley and Elizabeth Ashley."

A hearing was had upon this motion on the 27th day of May, 1901, and the motion overruled. An appeal was taken and a transcript of the proceedings had filed in this court November 25, 1901. The transcript and bill of exceptions contains the record in the proceedings had both on the appointment of the receiver and on the motion of the defendants for his discharge and, as we understand, the attorney for the appellants insists that both orders are here for review by this court. We can not agree with this view of the case. The order appointing the receiver was made June 22, 1900. The statute allows the defendants six months only to appeal from that order. No appeal was taken until November 25, 1901, the date of the filing of the transcript in this court. We have no jurisdiction therefore to review the order made by the district court in appointing the receiver, and the appeal, so far as it involves that order, must be dismissed.

Relating to the ruling of the court upon the motion to discharge the receiver, we have no doubt of its correctness. The application was based solely upon the ground that the premises was the homestead of the appellants. That question had already been adjudicated by the court on the hearing for the appointment of the receiver. The bank insisted that the defendants had abandoned their residence upon the property. The defendants insisted that

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it was still their homestead. If, as claimed by the defendants, the court was imposed upon by affidavits secured from parties under a misunderstanding of what they recited, the defendants should have applied to the court for an order opening the case for further hearing or attacked the order by some other proceeding, but they could not, on a motion to discharge the receiver, retry the questions that have been tried and determined on the hearing for his appointment.

We recommend that the order appealed from be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

HECTOR McLEAN V. CHARLOTTE L. McCORMICK ET AL.

FILED FEBRUARY 4, 1903. No. 12,428.

Commissioner's opinion. Department No. 2.

1. **Mortgages: FORECLOSURE: SALE BY PURCHASER PENDING APPEAL: GRANTEE'S RIGHT TO SHERIFF'S DEED.** A quit-claim deed by a purchaser at foreclosure sale, made pending appeal from an order of confirmation, conveys all the interest of such purchaser, and entitles the grantee to the benefit of a sheriff's deed executed upon affirmance of the order.
2. **Mortgages: FORECLOSURE: NOTICE OF SUIT TO TENANT UNDER ORAL LEASE.** A tenant under an oral lease for one year made prior to service of process in a foreclosure suit who afterwards, on expiration of the term, enters into another oral lease pending suit, is charged with notice of the suit and takes subject to such decree as may be rendered against his lessor.

APPEAL from the district court for Antelope county.
Tried below before ROBINSON, J. *Affirmed.*

E. D. Kilbourn, for appellant.

Jackson & Williams, contra.

POUND, C.

McLean was the purchaser at a sale of land under decree of foreclosure. After confirmation, and pending ap-

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peal therefrom, he executed and delivered a quit-claim deed to one Michaelson. Upon affirmance of the order of confirmation, a sheriff's deed issued to McLean. Thereupon Michaelson applied for a writ of assistance against all persons claiming under the defendants in the foreclosure suit. Escrit, a tenant under a parol lease from the mortgagor resisted this application, and has appealed from an order granting it.

We think the order was right. It is true a quit-claim deed will not convey an after acquired title or interest. *Hagensick v. Castor*, 53 Neb., 495. But it does convey all the interest or title which the grantor has at the time, whether legal or equitable. *Leavitt v. Bell*, 55 Neb., 57. On affirmance of an order of confirmation, the purchaser's title relates back at least to the date of the order. *Clark & Leonard Investment Co. v. Way*, 52 Neb., 204; *Yeazel v. White*, 40 Neb., 432. In 2 Freeman, Executions [3d ed.], section 323, quoted with approval in *Yeazel v. White*, *supra*, the learned author says: "The interest of the purchaser is certainly something more than a lien. It seems more like an inchoate title than like a lien; and it is generally, for the purposes both of voluntary and involuntary transfers, treated like real estate." Hence the grantee in a quit-claim deed executed by the purchaser pending appeal from the order of confirmation is entitled to the benefit of the sheriff's deed executed upon affirmance of the order. *Gage v. Sanborn*, 106 Mich., 269, 64 N. W. Rep., 32.

Appellant had entered under a written lease for one year, which expired a few weeks before the foreclosure suit was begun. At the expiration of the written lease, an oral lease was made "on the same terms." When this expired, and pending the foreclosure, a further parol lease was entered into under which he remained in possession. Under such circumstances appellant can not claim that he is holding under a title derived prior to the suit. The oral leases were valid for one year only, and he expressly testifies that the first one was in the same terms as the

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prior written lease for a year. Hence after the first oral lease expired, he was in under a lease entered into pending suit, and was charged with notice thereof. He took subject to the decree rendered against his lessor and can not hold possession adversely thereto. Section 85, Code of Civil Procedure.

We recommend that the order be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

CLARA A. TRACY V. THE SUPREME COURT OF HONOR.

FILED FEBRUARY 4, 1903. No. 12,437.

Commissioner's opinion. Department No. 3.

Beneficial Associations: CERTIFICATES, DELIVERY OF: WHAT CONSTITUTES: INSURANCE. On the facts stated, *held*, that a member of a fraternal society had fully complied with the rules and regulations thereof and that the delivery of his certificate by such order, to an officer of the subordinate lodge of which he was a member, was a delivery to him.

ERROR from the district court for Adams county. Tried below before ADAMS, J. *Reversed*.

John C. Stevens, for plaintiff in error.

Tibbets Bros. & Morey, contra.

ALBERT, C.

This is an action on a beneficiary certificate alleged to have been issued by the defendant to William L. Tracy, insuring his life in the sum of \$2,000 in favor of his wife, who is the plaintiff in this case. The defense interposed is that, by reason of the failure of the assured to comply with the terms and conditions of the rules and regulations of the order, the certificate was never delivered and never became operative. A trial to the court without a

jury, resulted in a finding and judgment for the defendant. The plaintiff brings error.

The nature of the defense necessitates an examination of the following provisions of the constitution of the defendant order:

"Article 8.

"Sec. 3. Application for membership must be made in writing on blank forms prescribed by the board of directors, and all questions must be satisfactorily answered. The applicant must be recommended by two members in good standing of the district court, and the application must be accompanied by such admission fee as the district court may prescribe, but not less than \$3 for a \$500 benefit; \$4 for a \$1,000 benefit; \$5 for a \$2,000 benefit; exclusive of the medical examiner's and supreme medical director's fees; and if the member wishes to increase the amount of his benefit, he will be required to pay an additional fee of \$2. A member who wishes to decrease the amount of benefit named in his certificate may do so by surrendering the same and paying a fee of 50 cents.

"Sec. 4. All applications for membership shall be read in open court by the recorder, and the chancellor shall at once refer the same to an investigating committee of three members. After this committee reports, if the report be favorable, a vote by ballot shall be taken. The number of black balls necessary to reject an application shall be such as is fixed by the by-laws of the district court. If elected, the recorder shall forward the application to the medical examiner of the district court, or if application is made on a card prescribed for that purpose, he shall forward a blank application, having in either case first entered thereon the report of the investigating committee and a record showing that the application was read in open court, the candidate balloted for and elected, and shall notify the applicant of his election and direct him to appear before the medical examiner for examination. Upon receipt of this application by the examiner the applicant shall be examined, provided the person examined has been

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properly identified to him as the applicant. If the medical examiner recommends the applicant, the application shall be sent to the supreme medical director, accompanied by a fee of 25 cents.

"Sec. 5. If the supreme medical director rejects the applicant, he shall immediately notify the recorder; if he recommends the applicant, he shall forward the application to the supreme recorder, who shall forthwith issue a benefit certificate, which shall be signed by the supreme chancellor and attested by the supreme recorder, for such amount as the application calls for and the benefit certificate shall be forwarded by the supreme recorder to the recorder of the district court. Upon receipt of the benefit certificate, the recorder shall notify the candidate and direct him when to appear in the district court at a regular or special meeting for initiation, due notice of the object of such special meeting having been given to each member.

"Sec. 6. At any time before initiation of applicant, the district court may, by a majority vote, refuse to initiate, and may return the benefit certificate with a certified copy of such refusal to the supreme recorder, and in such case the admission fees shall be returned to the applicant.

"Sec. 7. Any person who shall falsely answer questions in the medical examination in regard to age, habits or character, or in any way use deception to gain admission to the order, shall, on conviction, be expelled.

"Sec. 8. If the applicant is rejected by the district court, the initiation fee shall be returned to him, and he can not make application to become a member again within six months. If rejected the third time he will be forever debarred from becoming a member. If rejected by the medical examiner or supreme medical director, one year must elapse before the applicant can make application again and if rejected by the supreme medical director the second time he will be forever debarred from becoming a member.

"Sec. 9. If the applicant fails to report for medical examination within thirty days after his election, or fails

to report for initiation within sixty days from date of his benefit certificate, he shall forfeit his admission fee, and if he desires, at the expiration of that time, to become a member, he must again make application and furnish a certificate of present good health, in which event his fee already paid may be credited on the second application.

"Sec. 10. As soon as initiated every member shall deposit with the recorder the amount of one benefit assessment according to the table of rates, and general fund dues to the end of the current term at the rate of 8½ cents per month, and shall be liable for assessments current at the time of death.

"Sec. 11. Every benefit certificate holder shall be liable for the payment of the assessments next levied after his initiation, and for all assessments levied thereafter, including assessments current at the time of his death.

"Sec. 12. The first liability of the benefit members of a new district court shall be for that benefit assessment next levied after the date of the charter and the date of the initiation of the members thereof.

"Sec. 13. Before the recorder shall deliver a benefit certificate to a member, such member must come in person and sign the certificate in his presence."

"Article XIV.

"Sec. 1. Petitions for charters shall be in such form as the supreme chancellor may prescribe, and shall be signed by at least ten applicants of good physical and mental qualifications and of strictly temperate habits, and accompanied by a charter fee as hereinafter provided.

"Sec. 2. On receipt of the petition and fee, and the applications and supreme medical director's report on each petitioner, the supreme chancellor may, if in his judgment it will be conducive to the best interests of the order, supply a charter, rituals, benefit certificates and necessary blanks for the clerical work of a district court, and authorize the institution of the same forthwith.

"Sec. 3. The instituting officer shall, before proceeding with the institution of the district court, know that

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the requisite number of petitioners have passed a favorable examination, and see that all papers are in due form and that the laws of the order are complied with. He shall, before an election is held, explain the duties of each officer of the district court, and shall install and instruct the officers elected in their respective duties, and exemplify to them the secret work of the order, and explain the requirements of the order as to the payment of assessments and *per capita* tax, and also in relation to the adoption and approval of by-laws.

"Sec. 4. The supreme recorder shall report to the supreme chancellor the name and location of any court in the jurisdiction whose membership may be less than ten, and shall at the same time mail to said court a notice of his action. If the three next reports from said court do not show ten or more members in good standing, the charter of said court shall be revoked, and the supreme recorder shall transfer by card to the nearest court the remaining members."

The constitution provides for two classes of members, namely, social members and benefit members. The former are only entitled to the social privileges; the latter, in addition to such privileges, have the benefit of life insurance furnished by the order.

It is conceded that the assured was received into the order as a charter member of a local lodge, or court, instituted at Roseland on the 20th day of July, 1898; that the certificate in suit was issued on the 30th day of the same month, signed by the supreme chancellor, attested by the supreme recorder and by the latter officer, forwarded to the recorder of the local lodge at Roseland, for delivery to the assured. It is also conceded that there never was a manual delivery of the certificate to the assured and that he died on the 2d day of September, 1898.

The only delinquencies imputed to the assured are that he omitted to comply with sections 10 and 13, of article 8 of the constitution. The plaintiff insists that these sec-

tions do not apply to charter members, and we incline to the same view.

Section 10 requires the members, as soon as initiated, to pay the recorder certain assessments. When charter members are initiated, there is no recorder because no election has yet been held. A considerable interval might intervene between such initiation and an election. Another section of the constitution requires the recorder to furnish bonds in such amount as the lodge may order. Hence, another interval must intervene between the election of a recorder and his installation. From section 5, article 8, and section 2, article 14, it is clear that the framers of the constitution contemplated that the certificates be on hand, and ready for delivery to the members, as soon as initiated. It is not likely that in providing a scheme of insurance, they would provide one that would permit a mere detail to occasion such delay in concluding a contract of so much importance to its members, as would be occasioned by a compliance with section 10 by charter members. Moreover, section 12 specifically provides that the first liability of "benefit members" of a new lodge shall be for that benefit assessment next levied after their initiation. The preceding section provides what shall be the first liability of each "benefit certificate holder." It will be seen that these sections refer to two different classes, namely, "benefit members" and "benefit certificate holders." One received as a member other than a social member, becomes a "benefit member" as soon as initiated but does not become a "benefit certificate holder" until he receives his certificate. Section 11, therefore, states the first liability of a member after receiving his certificate, and section 12, the first liability of a charter member after initiation. This, to our minds, precludes the idea that section 10 was intended to apply to charter members, because if it were, the first liability of such members would be the payments mentioned in that section.

As to section 13, what has been said of section 10 applies in part to it. As before stated, section 2, article 14,

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contemplates that the certificates be issued and ready for delivery to the members as soon as initiated and does not contemplate withholding the certificates until a recorder be elected and qualified. Besides, the recorder of a new lodge is, presumably, a charter member. That of itself would indicate that the requirement of section 13, that the member must come in person and sign the certificate in the presence of the recorder, was not intended to apply to charter members. Besides, the certificates are what their name purports, merely certificates. The signature of a member thereto seems to serve no useful purpose. From those parts of article 8, above set out, it would appear that the signing of the certificate is intended to follow initiation as a part of the ceremonial pertaining thereto and, as it could not thus follow the initiation of charter members, it is not required of such members.

If we are correct in the foregoing, the assured had fully complied with the requirements of the order, and was entitled to a delivery of the certificate; consequently, its delivery to the recorder of the local lodge was a delivery to him.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

AMES and DUFFIE, CC., concur.

REVERSED AND REMANDED.

Opinion on rehearing follows.

CLARA A. TRACY V. THE SUPREME COURT OF HONOR.

FILED OCTOBER 7, 1903. No. 12,437.

Commissioner's opinion. Department No. 3.

Beneficial Associations: CERTIFICATES, DELIVERY OF: WHAT CONSTITUTES: INSURANCE.

REHEARING of case reported *ante*, page 189.

ERROR from the district court for Adams county. Tried below before ADAMS, J. *Former judgment of reversal adhered to.*

John C. Stevens, for plaintiff in error.

Tibbets Bros. & Morey, contra.

DUFFIE, C.

A careful re-examination of the record in this case and full consideration of the brief and argument presented by the parties has not served to change our former views. Sections 3 to 11 of article 8, undoubtedly refer to new members initiated into an existing lodge and have no reference whatever to charter members. We again quote section 12 of article 8, as follows: "The first liability of the benefit member of a new district court shall be for that benefit assessment next levied after the date of the charter and the date of the initiation of the members thereof." This section, as its language imports, fully defines the rights and liabilities of a charter member. The sections immediately preceding relate to the application, acceptance and initiation of new members in a duly constituted lodge or court and have, we think, no application whatever to charter members of a newly instituted lodge. This is made plain by sections 1, 2 and 3 of article 14 relating to the institution of a new lodge which we again quote.

"Section 1. Petitions for charters shall be in such form as the supreme chancellor may prescribe and shall be signed by at least ten applicants of good physical and mental qualifications and of strictly temperate habits and accompanied by a charter fee as hereinafter provided.

"Section 2. On receipt of the petition and fee and the applications and supreme medical director's report on each petitioner, the supreme chancellor may, if in his judgment it will be conducive to the best interests of the

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order, supply a charter, rituals, benefit certificates and necessary blanks for the clerical work of a district court, and authorize the institution of the same forthwith.

"Section 3. The instituting officer shall before proceeding with the institution of the district court know that the requisite number of petitioners have passed a favorable examination and see that all papers are in due form and that the laws of the order are complied with. He shall before an election is held, explain the duties of each officer of the district court and shall install and instruct the officers elected in their respective duties and exemplify to them the secret work of the order and explain the requirements of the order as to the payment of assessments and *per capita* tax and also in relation to the adoption and approval of by-laws."

In these provisions for the institution of a new court it will be seen that an examination of the charter members by some physician is contemplated, whose report must be approved by the supreme medical director. If the supreme chancellor decides to grant a charter he is then to supply a charter, rituals, benefit certificates and necessary blanks for the clerical work of the district court and authorize the institution of the same forthwith. These provisions of section 2 clearly contemplate that the benefit certificates for charter members shall be forwarded to the new court with the charter. The members are initiated by the instituting officer and these members then elect officers of the new district court. Nothing is plainer to our minds than that these charter members are full members of the order, entitled to all its benefits and, as said in section 12 of article 8, their first liability is "for that benefit assessment next levied after the date of the charter and the date of the initiation of the members thereof." That the benefit certificates in this particular instance did not accompany the charter and were not delivered to the charter members at the date of the institution of the new court, was no fault of the members themselves and could not legally deprive them of any

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right to which the constitution of the order entitled them. The decedent was a charter member. He was present at the institution of the court, was initiated at that time, became a full member of the order and entitled to all its benefits. The failure of the supreme chancellor to furnish benefit certificates to members of this court at the time the charter was forwarded and the court instituted ought not to work to the disadvantage of any member of the court.

We recommend that the former opinion be adhered to.

KIRKPATRICK and POUND, CC., concur.

FORMER OPINION ADHERED TO.

THE OMAHA BREWING ASSOCIATION, APPELLANT, v. HERMAN ZELLER ET AL., APPELLEES.

FILED FEBRUARY 4, 1903. No. 12,472.

Commissioner's opinion. Department No. 1.

1. **Fraudulent Conveyances: CONSIDERATION.** A deed for \$300, by one much involved financially, to his brother-in-law of property worth admittedly \$1,000, and probably more, which the latter conveys the following day to the grantor's wife in consideration of \$250, is not for a sufficient valuable consideration as against the grantor's creditors.
2. **Fraudulent Conveyances: DEBT OF GRANTOR TO GRANTEE: SURPLUS, DISPOSITION OF.** In the absence of homestead rights, the value of the premises in the wife's possession, to the extent at least of all in excess of the \$300 actually due the first grantee, would be subject to the grantor's prior indebtedness.
3. **Bills and Notes: PAYMENT, APPLICATION OF: MERGER IN JUDGMENT.** An indebtedness on notes, which is by express agreement incorporated, with other indebtedness, into other notes, and finally merged into a judgment on the last note, will be held to have existed from the inception of the first note, although open accounts have been made and settled in much larger amounts in the meantime.
4. **Homestead: ABANDONMENT: INTENTION: REOCCUPATION.** An intention to abandon a homestead and an actual leaving must concur in

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order to deprive a debtor of homestead rights, and where no new homestead premises have been acquired, and the occupation of former ones has been resumed before judgment, the fact that the debtor resided, as he says for business reasons, for nearly six years elsewhere and was registered as a voter in an adjoining city, does not conclusively show an abandonment of the homestead.

APPEAL from the district court for Douglas county.
Tried below before FAWCETT, J. *Affirmed.*

Hamilton & Maxwell, for appellant.

P. A. Wells and *F. E. Snider*, contra.

HASTINGS, C.

This is a suit upon a creditor's bill brought November 15, 1900, alleging that in September, 1899, plaintiff recovered a judgment against Henry Zeller for \$2,391.10 in the Douglas county district court; that execution had been returned unsatisfied and the judgment was unpaid; that Zeller had been for more than four years insolvent; that November 16, 1896, he conveyed to one Paul Doescher, his brother-in-law, the east 125 feet of lot one, block four, in Brown's Park, an addition to South Omaha, and the deed was recorded December 8, 1896; that on November 17, Doescher conveyed the premises to Zeller's wife, and that the deed was recorded January 18, 1897; that both deeds were without consideration and made and received for the purpose of fraudulently hindering and delaying Zeller's creditors, and that the indebtedness on which the judgment was rendered accrued prior to November 16, 1896. Defendants answer admitting the conveyances and relationship of the parties and deny the fraudulent intent and lack of consideration for the deeds; they deny that the indebtedness was incurred prior to November 16, 1896, and say all of Zeller's indebtedness to plaintiff existing at that time was long ago paid; they say that Zeller at the time of the conveyances was amply able to pay his debts; that the property was subject to mortgages to the amount of \$3,200, on which Mrs. Zeller has

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paid about \$2,000; that Zeller's equity in the premises at the time was worth less than \$2,000 and that they were his homestead and absolutely exempt from liability upon plaintiff's claim; that the conveyances were made with plaintiff's full knowledge and that the indebtedness upon which the judgment was based was incurred after the conveyances and with full knowledge on plaintiff's part of their existence. Plaintiff's reply admits the existence of the mortgages and admits Mrs. Zeller's payments, but denies that they were made out of her own money and denies the remaining allegations of the answer.

The trial court finds: First. That the evidence fails to establish that the deeds were without consideration. Second. That Zeller was insolvent when they were made. Third. That he did not have other property sufficient to pay his debts. Fourth. That his intention was to hinder, delay and defraud his creditors. Fifth. That the effect of the conveyances was to hinder, delay and defraud plaintiff. Sixth. That plaintiff acted seasonably on discovering the alleged fraud. The court finds also that the conveyance to Doescher was for a valuable consideration; that it does not appear that Doescher knew Zeller's fraudulent intent or shared in it. It finds that the property described in the petition was homestead property, and that it does not appear that Zeller's interest in it was worth \$2,000, and a decree of dismissal was entered. There seems to be no express finding as to the question of when the indebtedness embraced by this judgment was incurred.

It seems clear that the essential questions in this case are:

Were the conveyances to Doescher, and by Doescher to Mrs. Zeller, for a valuable consideration, and innocent of fraud?

Was the indebtedness embraced in the judgment incurred prior to the making of such conveyances?

Were the premises a homestead?

As to the first question the trial court, as above stated,

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finds that the deed to Doescher was for a valuable consideration, and that there is no proof of any sharing of the fraudulent intent of Zeller, or knowledge of it, on Doescher's part. There is evidence uncontradicted that Zeller at the time was indebted to Doescher in the sum of \$300 for money loaned. Zeller and his wife say that the property was deeded to Doescher, who is a brother of Mrs. Zeller, in consideration of this \$300 and of \$700 more to be paid. The next day owing to objections of Zeller's wife, he came and asked for his money and made the deed to Mrs. Zeller. The latter says she paid him \$250 out of money acquired by her through keeping a restaurant in connection with her husband's saloon and by renting furnished rooms. The other \$700 were never paid and to that extent the conveyance was a voluntary one. It is true that Zeller claims that Doescher still owes the \$700 to him. Mrs. Zeller makes no mention of it, and there is testimony of Zeller's bar-keeper at the time, that by Zeller's instructions he drew up a deed for this property by Zeller and wife to Doescher and from the latter and wife to Mrs. Zeller. He does not know whether or not they were used.

Zeller says that at the time of the conveyances the equity in the property was worth about \$1,000. There is other testimony putting it at from \$1,800 to \$2,300. It is impossible to see how this conveyance can be held to be other than voluntary so far as the excess above \$300 is concerned. Of course, as against her husband's creditors the burden of showing good faith and a fair consideration is on Mrs. Zeller. As to Doescher, the proposition is the other way and there is nothing to show that his action was not in good faith and really taken to get his money. There is, however, no claim that he had more than \$300 in the property. As to the consideration for the deeds, the court's finding of a consideration is, to the extent of \$300, sustained by the evidence, but no farther. And the property was admittedly worth \$1,000 or more.

As to the second matter, the time when this indebted-

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ness was incurred, the trial court made no express finding. Its general finding for the defendants, however, must be taken in their favor on this point. It was among the allegations of plaintiff, which were denied, that the indebtedness antedated the deeds. The facts of the matter are that Zeller was conducting a saloon rented from plaintiff and selling plaintiff's beer. Payments of "rent" seem to have included the payment for the saloon license and to have varied from \$3,666.33 the first year to \$2,800 later. The business began in 1895. December 31, 1895, Zeller gave a note or notes for \$1,488.23 in settlement for the unpaid part of the "rent" for 1895, after having received credit for "all claims of any nature whatever," as his receipt of that date recites. On January 30, 1897, he gave the following receipt:

"Received of Omaha Brewing Association. Charge 1-30, 1897.

"My promissory notes canceled one Feby. 8-95 160; one July 23-95 200; one Dec. 31-95, 1,488.23; six for 233.33 ea.; one for 233.37 upon which there is balance due of 1,364.75. Total 3,212.98 less Cr. Horse & Buggy 275. Allowed rprs 142. My note renewal 2,792.98 Bal. Herman Zeller."

At the same time he gave his "renewal note" for \$2,792.98. March 4, 1899, he gave the following receipt:

"Received of Omaha Brewing Association.

"Charge 3-4-1899.

"My note Jany 30-97 for 2795.98
with the following endmts:

"Dec. 31, '99 by Cr..... 398.75

"Jany 13, '99 by c..... 450.75

"March 13, '99 by c..... 38.58

"March 13, '99 by Cr..... 475.00 Total 1363.08

"Leaving bal 1432.90

"Due them also they advanced me cash..... 875.00

"Making total 2307.90

due them for which I give my note and receive my old note dated Jany. 30-97.

HERMAN ZELLER."

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It is claimed by counsel that the payments made from time to time during these years should be held to extinguish the old indebtedness and that this amount remaining due on March 4, 1899, should be held to be a part of the later indebtedness. Plaintiff's secretary admits noticing the recording of the deeds for this property in December, 1896. The amount of the indebtedness at that time does not appear.

Plaintiff's counsel make no claim that the \$875 loaned to Zeller in March, 1899, is chargeable against this property, but do claim that the \$1,432.90 carried from the note of January 31, 1897, to the note on which judgment against Zeller was obtained is so chargeable. There is voluminous testimony as to the state of the accounts between the parties at various times and it appears that Zeller's payments to plaintiff amounted to nearly or quite \$10,000 yearly while the business was going on. There seems, however, no question that when the note was given on March 4, 1899, on which the plaintiff's judgment was afterwards obtained, at that settlement it was understood that \$1,432.90, on the note of January 30, 1897, were still unpaid and were carried over into that last note.

It is therefore only necessary to determine whether this remainder of \$1,432.90 on the note of January 30, 1897, represents an indebtedness incurred before the making of these deeds on November 16 and 17, 1896. The receipt which accompanies the note of January 30, 1897, sufficiently indicates how it was made up. It seems clear that whatever payments had been made during the preceding year by the parties, the \$1,488.23 of December 31, 1895, was still out and was included in the note then given. It seems clear that more than \$2,000 of this \$2,795.98 note of January 30, 1897, had accrued before November 1, 1896. It would seem that notwithstanding the large amounts of money paid by Zeller to plaintiff in 1897, 1898 and 1899, plaintiff is warranted in claiming that these payments were with Zeller's assent applied to other accounts and that the \$1,432.90 carried over into the last

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note from that of January 30, 1897, was indebtedness incurred before November 16, 1896.

It remains to be considered whether or not the trial court was warranted in finding that the premises in question were exempt as a homestead and therefore not susceptible of fraudulent alienation.

It is undisputed that there are three houses on this property and that one of them has been occupied as a residence by Zeller and his family since the summer of 1899. It appears that Zeller and his wife have had since 1891, no other property which was exempt as a homestead and that they resided on this property in question in 1893. In 1894 they lived in rooms over the husband's saloon in South Omaha, and in 1895, when the business with plaintiff began, moved to Omaha to be near it and lived in rooms in various places in the city until 1899. After this business was closed they returned to one of the houses on this property as has been stated. They testify to an intention to return to these premises and to the acquisition of only temporary quarters elsewhere. It appears, however, that the husband registered as a voter resident of Omaha during his stay there. We are not prepared to say that the district court was wrong either in finding that these premises were the family homestead, or in finding that they were not shown to be of more than \$2,000 value above incumbrances. *Dennis v. Omaha National Bank*, 19 Neb., 675; *Corey v. Schuster*, 44 Neb., at page 278.

For this reason, it is recommended that the decree of the district court be affirmed.

KIRKPATRICK and LOBINGIER, CC., concur.

AFFIRMED.

Rosewater v. Horton.

EDWARD ROSEWATER V. RICHARD S. HORTON, TRUSTEE OF
GREATER AMERICAN EXPOSITION, BANKRUPT.

FILED FEBRUARY 4, 1903. No. 12,523.

Commissioner's opinion. Department No. 1.

Pleading: PETITION: TITLE: AMENDMENT: JURISDICTION. Entitling a petition "In District Court of Douglas County" when it is prepared for and filed in the county court, is an amendable defect, and does not prevent jurisdiction attaching when summons is duly served and returned, the defect corrected and pleadings to the amended petition filed by the defendant.

ERROR from the district court for Douglas county.
Tried below before BAXTER, J. *Affirmed.*

E. W. Simeral, for plaintiff in error.

T. W. Blackburn and *Richard S. Horton*, contra..

HASTINGS, C.

Only one question is presented by the record in this case: Does the filing of a petition in the county court of Douglas county entitled "In the District Court" of the same county prevent the acquiring of any jurisdiction in the case by the county court?

On December 21, 1900, plaintiff filed in county court his petition against the defendant Rosewater asking for a judgment in the sum of \$250 and interest for assessments on stock in The Greater American Exposition. The petition was entitled "In the District Court of Douglas County"; summons was issued by the county court on that day returnable October 1, and was duly served, requiring the defendant Rosewater to answer in that court on October 1. On that day defendant appeared "for the purpose of this motion and for no other object" and suggested that the petition was entitled in the district court of Douglas county. On October 10, the matter came up for hearing and the plaintiff obtained leave to

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amend the petition instanter by changing the name of the court in the title; defendant was given ten days to plead. On October 20, he filed a motion to require the plaintiff to separately state and number his causes of action. On November 19, on defendant's application, the case was continued to the December term. December 13, an amended answer was filed, plaintiff replied and the case was tried to the court, which found for the plaintiff and rendered judgment for \$277.45. The amended answer admits subscription to the stock to the amount of \$500; alleges payment in full by means of services to The Greater American Exposition and alleges that the county court had no jurisdiction for the reason that the petition in said cause was entitled "In the District Court for Douglas County." From the judgment in the county court an appeal was taken; the same issues presented, and judgment again rendered against the defendant for \$291.13, from which he brings error to this court.

As above stated the only question presented for our consideration is the jurisdiction of the county court and by consequence the jurisdiction of the district court. It will be observed as above stated, that when this defect in the petition was suggested to the county court, leave was obtained to amend the petition and leave was then given to defendant to plead, of which he availed himself, and in the following month, more than thirty days after the amendment of the petition, he filed, under leave of court, an amended answer. Section 92 of the Code of Civil Procedure requires certain things to be contained in the petition, one of which is the name of the court. It is conceded that this provision of the Code has application to proceedings in the county court to recover the amount in question here and that the jurisdiction acquired by the county court was by virtue of this petition and the issuance of a summons upon it. Was the petition, because of its failing to contain the name of the court, a nullity and not susceptible of amendment?

In *Merrill v. Wright*, 54 Neb., at page 519, the failure

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to allege an essential fact required to constitute a cause of action is held not to render a petition for foreclosing a tax lien a nullity. The petition is held to be amendable and by consequence that it prevents the statute of limitations running against the lien which was sought to be foreclosed. This was done largely on the authority of section 145 of the Code of Civil Procedure, which provides, "The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

Plaintiff in error has cited certain Iowa cases, the first of which, is *Jordan v. Brown*, 32 N. W. Rep. [Ia.], 450, but the defect in that case was not attempted to be remedied so far as the court in which the petition was originally filed was concerned. Judgment was entered while there was no petition on file as required by the statute, without any appearance on the part of the defendant, or without his ever having been summoned in that court. It is not surprising that the supreme court of Iowa held that there was no jurisdiction.

Garretson v. Hays Bros., 29 N. W. Rep. [Ia.], 786, and *Morgan v. Small*, 33 Ia., 118, both seem to have been dismissed on the ground that there was no petition on file at any time in these actions on which a judgment could have been rendered. We do not discover in the Iowa cases any holding that this defect in question in the present case is not amendable nor do we see any reason why it should not be held to come within the liberal statutes of amendments provided in this state. In this case the defendant was duly served with summons, duly appeared in the action, has presented his defense, and we see no reason why he should not in conscience be bound by the result.

In *McMurtry v. State*, 19 Neb., 147, 26 N. W. Rep., 915, it is held that the district court was not justified in refusing to regard an answer filed which was entitled in the county court. The answer was not a nullity, was amend-

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able, and it was error on the part of the district court to disregard it.

In *Livingston v. Coe*, 4 Neb., 379, the heading of a petition "Supreme Court of the State of New York," and filing it in the district court of this state, was held to furnish no ground for the dissolution of an attachment in the case because it was held that the petition was amendable.

In *Jansen & Co. v. Mundt*, 20 Neb., 320, 30 N. W. Rep., 53, in reversing the action of a district court in dissolving an attachment because, among other things, the affidavit was not entitled in the cause, citing both of the foregoing cases, the court says:

"The failure to entitle a proceeding properly may be cause for a motion to amend, but is not cause for dismissing an action. * * * The failure to entitle papers, or a mistake in that regard, will not be a fatal defect provided that it is apparent in what case they were intended to be filed. Courts are created for the purpose of enforcing and protecting rights, not for the purpose of seizing technical and immaterial defects to defeat them. Under the Code, if the court has jurisdiction of the subject-matter and the parties, any defect in the pleadings or process is amendable, and when necessary the proper amendments should be made at the costs of the party in fault. The rule as to amendments is to be liberally construed in furtherance of justice."

It is recommended that the judgment of the district court be affirmed.

KIRKPATRICK and LOBINGIER, CC., concur.

AFFIRMED.

McCleneghan v. Norton.

JOSEPH MCCLENEGHAN V. A. H. NORTON ET AL.

FILED FEBRUARY 4, 1903. No. 12,525.

Commissioner's opinion. Department No. 1.

1. **Trial: DIRECTING VERDICT: EVIDENCE SUFFICIENT.** Where the evidence without contradiction establishes the right of one party to an action to a judgment, it is not error for the trial court to direct a verdict accordingly.
2. **Bills and Notes: ACTION ON NOTE: EVIDENCE SUFFICIENT.** Evidence examined, and found sufficient to sustain the verdict and judgment rendered thereon.

ERROR from the district court for Douglas county.
Tried below before SLABAUGH, J. *Affirmed.*

Nelson C. Pratt, for plaintiff in error.

Baldrige & De Bord, contra.

KIRKPATRICK, C.

This is an action brought by A. H. Norton, defendant in error, against Mrs. Samuel McCleneghan, and Joseph and James McCleneghan, upon a promissory note for the sum of \$266, dated June 12, 1893, given by the McCleneghans to defendant in error. Action was commenced thereon in the county court of Douglas county, resulting in a judgment against the McCleneghans above named by default. Afterwards, on application of Joseph McCleneghan, this judgment was set aside as to him, and trial had, which resulted in a judgment in his favor. From this judgment in county court the cause was taken to the district court by A. H. Norton, who filed a petition in district court, setting up a copy of the note, which was signed by "Mrs. Sam'l McCleneghan" and "McCleneghan Bros." It was alleged that Joseph and James McCleneghan did business as McCleneghan Brothers; that the firm name was signed to the note by Joseph McCleneghan; that \$10 had been paid thereon, and that no other

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or further payment had been made. Mrs. Samuel McCleneghan and James McCleneghan again made default, and Joseph McCleneghan for answer filed a general denial. At the conclusion of plaintiff's testimony, defendant McCleneghan refused to introduce any testimony, and both parties to the action asked for peremptory instructions in their favor. The jury, as directed by the trial court, returned a verdict against all the defendants, and judgment rendered thereon. A motion for a new trial by Joseph McCleneghan was by the court overruled, and he prosecutes this proceeding, making the other McCleneghans defendants in error because they refused to join with him as plaintiffs in this proceeding. The only question presented is that the trial court erred in refusing to instruct for plaintiff in error, and in directing a verdict for defendant in error Norton.

It is disclosed that some time prior to the execution of the note in suit Norton owned some cattle which were being pastured on a farm owned and controlled by the McCleneghans. Joseph McCleneghan asked Norton what he would take for the cattle, and was informed that he would take \$266, that the McCleneghans already had the cattle in their pasture, and that they would have to take their chances in getting them all there. McCleneghan agreed to take the cattle at the price named. Some time later Norton called on Joseph McCleneghan for payment, and was told that they were not ready to pay just then. Norton then suggested that he give a note signed by himself, his brother, and his mother. This Joseph McCleneghan promised to do. Norton returned to his home, and drew up a note which he sent to Joseph for signature as suggested. The note in due time was returned with the signatures as already stated. Some time before commencement of this action James, upon request of Norton, paid the sum of \$10 thereon, and said that they would pay the remainder as soon as they could. The testimony shows beyond question that James and Joseph McCleneghan were carrying on the business of buying and selling

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cattle as "McCleneghan Brothers"; that they kept an account in the bank at Valley in the name of the firm; that each gave checks on the bank drawn upon the account, signing the firm name to the checks. The cashier of the bank testified at the trial positively that the signatures to the note were those of Mrs. Samuel McCleneghan signed by herself, and of McCleneghan Brothers, signed by Joseph McCleneghan; that the words "McCleneghan Bros." were signed in the handwriting of Joseph. This testimony was amply sufficient to justify a verdict for defendant in error Norton. The evidence would not have authorized a verdict for plaintiff in error. The judgment is manifestly right, and it is, therefore, recommended that the same be affirmed.

HASTINGS and LOBINGIER, CC., concur.

AFFIRMED.

STATE OF NEBRASKA, EX REL. LEE DOUGLAS, V. WILLIAM ALSTADT, JUSTICE OF THE PEACE FOR DOUGLAS COUNTY, NEBRASKA.

FILED FEBRUARY 4, 1903. No. 12,548.

Commissioner's opinion. Department No. 2.

Appeal and Error: NEW TRIAL, MOTION FOR: NECESSITY FOR. Alleged errors of a trial court in the admission and exclusion of testimony can only be reviewed in this court when they have first been called to the attention of the trial court by a motion for a new trial.

ERROR from the district court for Douglas county. Tried below before SLABAUGH, J. *Affirmed.*

David Van Etten, for plaintiff in error.

John H. McFarland, contra.

OLDHAM, C.

This was an application for a mandamus to require the defendant, a justice of the peace, to approve an appeal

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undertaking; the alternative writ was issued; answer filed, and on the hearing the writ was denied. No motion for a new trial was filed in the court below, and all the allegations of error called to our attention in the brief of plaintiff in error are with reference to the action of the trial court in the admission and rejection of testimony and with reference to the sufficiency of the testimony to sustain the judgment.

We have long held that an application for a mandamus is in its nature an action at law which can only be reviewed on error proceedings, and the rule is too well established to require any citation of authorities that errors of the character alleged against in plaintiff's brief can only be reviewed by this court when they have first been called to the attention of the trial court by a motion for a new trial.

It is therefore recommended that the judgment of the trial court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

JOHN AND WILLIAM C. SHULL V. HARRIET BEST ET AL.

FILED FEBRUARY 4, 1903. No. 12,555.

Commissioner's opinion. Department No. 2.

1. **Mechanics' Liens: AGAINST BUILDING SEPARATE FROM LAND.** One who furnishes material, under contract, to a person in possession of a tract or lot of land with which to erect a house or other building thereon, in case such person does not become the owner of the premises, may have a mechanics' lien on such building separate from the land on which it is situated. *Pickens v. Plattsmouth Land and Investment Co.*, 31 Neb., 585.
2. **Mechanics' Liens: JUDGMENT ESTABLISHING LIEN AGAINST BUILDING: PERSONALTY.** A judgment or decree establishing such lien on the building alone separate from the real estate, and ordering it sold to satisfy the lien, necessarily adjudicates the question of the nature of the improvement, and in effect decrees it to be personal property.

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3. **Mechanics' Liens: AGAINST BUILDING: TITLE OF PURCHASER: REPLEVIN.** One purchasing the building at a sheriff's sale, under such decree, upon a confirmation of the sale, obtains title thereto as between the parties to the foreclosure and the right to remove it from the premises, and in case he can not obtain possession of it otherwise, it not appearing to be occupied as a family dwelling, he may maintain replevin therefor. *Waters v. Reuber*, 16 Neb., 99; *McDaniel v. Lipp*, 41 Neb., 713.

4. **Mechanics' Liens: AGAINST BUILDING: FORECLOSURE: SALE: SUBSEQUENT PURCHASE OF LAND BY DEFENDANT: REMOVAL OF BUILDING.** After the confirmation of the sale, made on the decree in the foreclosure suit the defendant therein, who purchased the material and erected the building, can not, by purchasing the land, prevent the removal thereof.

ERROR from the district court for Burt county. Tried below before DICKINSON, J. *Reversed.*

T. R. Ashley and W. G. Sears, for plaintiffs in error.

Gillis & Bowes, contra.

BARNES, C.

This was an action in replevin tried in the district court for Burt county. The plaintiffs in their petition and affidavit, filed in the lower court, alleged that they were the owners of a certain dwelling house, situated on the southeast quarter of the northwest quarter of section 2, township 23 north of range 10 in said county; that it was personal property, and of the value of about \$200; that the defendants wrongfully detained the same from their possession, and had so detained the same for the space of two and one-half years; that they had been damaged by reason thereof in the amount of the reasonable use of the said building, which they alleged to be \$5 per month during the whole of said time, or \$150. The answer of the defendants was a general denial. Upon these issues the cause was tried to a jury and at the close of the evidence, upon the request of the defendants, the trial court directed the jury to return a verdict in their

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favor. This was accordingly done. The plaintiffs filed a motion for a new trial, which was overruled, and thereupon prosecuted error to this court.

It appears from the bill of exceptions that the plaintiffs, on or about the 6th day of July, 1895, under an oral agreement with the defendant, George E. White, had furnished to him the necessary material for the erection of a dwelling house on the land above described; that they had taken the necessary steps to perfect a mechanics' lien thereon, that they commenced an action in the district court of Burt county to foreclose the same, and to that end on the 5th day of June, 1897, filed an amended petition against the defendants, George E. White, Annie White and Arthur White, setting forth facts, in the usual form, sufficient to constitute a cause of action for that purpose. It was alleged in the petition that the defendant, George E. White, was the owner in fee of the premises upon which the house in question was situated at the time he purchased the material used in its construction; that Annie White was his wife, and that Arthur White claimed some interest in the property, the nature and extent of which was unknown to the plaintiffs. The petition closed with the usual prayer for the foreclosure of a mechanics' lien, and for such other and further relief as equity might require. To this petition the defendants George E. White and Annie White, filed an answer as follows:

"1. Comes now the defendant, George E. White, and for himself and the defendant Annie White, answering the amended petition of the plaintiffs, deny each and every allegation in said petition contained.

"2. The defendants deny that they or either of them are the owners in fee of the land described in the plaintiffs' petition."

Upon the issues thus joined the cause was tried, and it appears from the decree, which was introduced in evidence, that the court found that there was due from the defendant, George E. White, to the plaintiffs the sum of \$250; and that on the 21st day of February, 1896, the

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plaintiffs made an account in writing of the items set forth in the said petition, and after making oath thereto filed the same in the county clerk's office of Burt county, Nebraska, and the same is duly recorded therein, and is a mechanics' lien upon the dwelling house situated on the southeast quarter of the northwest quarter of section 2, township 23 north of range 10, of Burt county, Nebraska, and that the plaintiffs are entitled to have the lien enforced against the building. Thereupon the following decree was entered:

"It is therefore considered by the court that the plaintiffs recover from the defendant George E. White the sum of \$250 and their costs herein expended; and in case said judgment is not paid within twenty days from the entry of this judgment that an order issue to the sheriff of Burt county commanding him to sell said building as upon execution, and apply the proceeds thereof in payment of the amount so found upon the confirmation of said sale."

It further appears that on the 15th day of November, 1897, an order of sale, or execution, was issued upon the judgment and decree and that the sheriff of Burt county sold the building in question to the plaintiffs; that afterwards the sale was confirmed and the sheriff was directed to make and deliver to the plaintiffs herein a bill of sale for the property so sold. The plaintiffs having failed to obtain possession of the building under the proceedings above mentioned, brought this suit in replevin for the purpose of obtaining the possession thereof.

It further appears from the evidence of the defendant George E. White, that at the time he purchased the material and erected the building in question, he had no interest whatever in the premises on which it was situated. He also introduced proof to show that at the time the building was erected it was placed upon a brick foundation, and was thus affixed permanently to the real estate. He further testified that about the time of the commencement of this action he obtained title, by deed, to the land described in the petition. The testimony disclosed that

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the value of the house in question was about \$300. Upon these facts, which are practically undisputed, the court directed the jury to return a verdict for the defendant, which was accordingly done. Plaintiffs' motion for a new trial was overruled and the court entered a judgment upon the verdict, in the alternative, requiring the plaintiffs to return the building to the defendants within the time named in the judgment, or if return could not be had that the defendants have judgment against the plaintiffs for the said sum of \$300 and costs of suit. The plaintiffs thereupon brought the case to this court by petition in error, and now contend that the court erred in directing the jury to return a verdict for the defendants.

The defendants contend that the judgment foreclosing the mechanics' lien, and the proceedings thereunder by which the plaintiffs claim they acquired the ownership and right to the possession of the building, are absolutely void, and therefore the court did not err in instructing the jury to return a verdict in their favor.

We are therefore required to determine whether under the provisions of article 1, chapter 54, of the Compiled Statutes of 1901 [Annotated Statutes, section 7100], one who furnishes material for the erection of a house to a person in possession of the real estate, who is not the owner thereof, can have a mechanics' lien upon the building so constructed apart from any lien upon the land upon which it is erected. This question presents some difficult features. A mechanics' lien is purely a statutory remedy, and unless the statutes expressly provide for it, or by a fair liberal construction of the statute such lien can be sustained, it can not be said to exist. Hence it has been held in many of the states that no lien can be obtained on a building or improvement alone. We find, however, upon an examination of the authorities that this question was before this court, and was decided in the case of *Pickens v. Plattsmouth Land and Investment Co.*, 31 Neb., 585. It appears that in that case the Plattsmouth

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Land and Investment Company had a contract with the Plattsmouth Land & Improvement Company for the purchase of certain real estate; that the investment company entered into a contract with Pickens to furnish lumber and material for the erection of a hotel to be situated thereon; that such material was furnished, and the building was erected; that the contract of purchase was abandoned, and thus the title to the land remained in the Plattsmouth Land & Improvement Company, and the investment company never had any title thereto. An action was commenced in the district court for Cass county by Pickens to foreclose a mechanics' lien which he had perfected upon the building and the premises on which it was situated. The facts above stated were made to appear on the trial, and the court held that the mechanics' lien attached to both the building and the premises, and rendered a decree of foreclosure. From that judgment an appeal was taken to this court, and it was held that no lien attached to the premises, and that part of the judgment should be reversed; that Pickens was entitled to a lien upon the building, the property of the investment company and that part of the decree was affirmed. It thus appears that we have already determined this question, and held that a lien may be had upon a building and improvement separate and apart from the premises upon which it is situated.

In the third paragraph of the syllabus in *Henry & Coatsworth Co. v. Fisherick*, 37 Neb., 207, 55 N. W. Rep., 643, we find the following:

"A person commencing to furnish material for, or commencing to labor on, an improvement on real estate must at the time take notice of the interest and title in the premises of the person with whom he contracted, as shown by the public records, as his lien for labor or material, aside from the improvement itself, attaches only to such interest."

The same rule is announced in *Waterman v. Stout*, 38 Neb., 396, 56 N. W. Rep., 987, and in *Hoagland v. Lowe*,

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39 Neb., 397, 58 N. W. Rep., 197. In *Carpenter v. Leonard*, 5 Minn., 119, the court in deciding this identical question made use of the following language:

"Section 1 of the act of August 12, 1858, Compiled Statutes, 696, provides 'that any person or company who shall have performed or may hereafter perform labor or furnish materials or machinery for erecting, constructing, altering or repairing, any house, mill, manufactory or other building or appurtenances, or for constructing, altering, or repairing, any boat, vessel or other water craft by virtue of a contract or agreement with the owner or agent thereof, shall have a lien to secure the payment of the same upon such house, mill, manufactory, or other building, and appurtenances * * * together with the right, title, or interest of the person or persons owning such house, mill, manufactory, or other building and appurtenances, on and to the land upon which the same shall be situated, not exceeding,' etc. It will be observed from this act, that in order that the lien should attach, it is not necessary that the owner of the building upon which the work has been performed should also be the owner of the land upon which the same is situated. The lien is upon the building, and also upon 'the right, title or interest, of the person owning such house,' whatever such interest may be."

The only essential difference between the statutes of Minnesota and the statutes of this state relating to mechanics' liens is, where we use the conjunction "and," in the statute of Minnesota are found the words "together with." It will be observed that in construing their statute the supreme court of Minnesota uses the words "together with," and the conjunction "and," interchangeably.

Many other cases might be cited in support of this rule, but it is believed that nearly all of them are based upon statutes which in effect declare that a lien may be had upon the building separate and apart from the land on which it is situated. In the case of *Rogers v. The Omaha Hotel Co.*, 4 Neb., 54, MAXWELL, J., speaking for the

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court says: "The object of the law under consideration, being to secure the claim of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions." We think the construction placed upon the statute in *Pickens v. Plattsmouth Land and Investment Co.* is correct, and should be adhered to, and we therefore hold that the court had power to enter the decree giving the plaintiffs a mechanics' lien upon the building in question and foreclosing the same. It follows that the judgment of the district court was not void.

Where a judgment or decree of a court of record is not void upon its face, when offered in evidence in another suit to sustain a right to which the party claims he is entitled thereunder, it is not open to collateral attack and will be held to establish whatever rights appear to be conferred thereby. "The record of a judgment regular on its face, in a case of which the court rendering it had jurisdiction, imports absolute verity until modified or reversed in a direct proceeding, and can not be attacked collaterally." *Bryant v. Estabrook*, 16 Neb., 217, 20 N. W. Rep., 245; *Chase v. Miles*, 43 Neb., 687, 62 N. W. Rep., 35; *Stenberg v. State*, 48 Neb., at page 316, 67 N. W. Rep., 190.

It is next contended on the part of the defendants, that although George E. White was not the owner of the premises at the time he purchased the material and erected the building in question thereon, yet he became the owner after the plaintiff purchased the house at the sheriff's sale under the decree foreclosing the mechanics' lien, and before the commencement of this suit, and having affixed the building to the soil permanently so as to make it a part of the real estate, he is now in a position to claim that the house is not personal property, but is a part of the realty, and as such owner he can prevent its removal and that an action of replevin can not be maintained to recover the possession thereof. The decree foreclosing the mechanics' lien necessarily adjudicated and settled the question of

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the nature of the building; it must have been adjudged to be personal property, and as such subject to the plaintiffs' lien, without regard to the real estate upon which it was situated. The defendants herein were parties to that action. Not having appealed from the judgment, but at all times having acquiesced therein and recognized its validity and binding force, they will not now be permitted to avoid its effect by the purchase of the real estate on which was erected the house in question.

The judgment of a court or tribunal having cognizance of the subject-matter is conclusive between the parties and their privies when the same matter comes in question between them in the same or another court. *State v. Board of County Commissioners of Buffalo County*, 6 Neb., 452; *Stenberg v. State*, *supra*. A judgment rendered by a court which had jurisdiction of the parties and of the subject-matter as between such parties conclusively settles all questions litigated, subject only to the contingency of a reversal or modification in the same proceeding. *Chase v. Miles*, *supra*. Such judgment settles all matters litigated, and can not be assailed collaterally.

The nature of the property in question in this suit was necessarily litigated and determined under the issues in the case foreclosing the mechanics' lien. By the decree of the court, as above stated, the building was held to be personal property, otherwise the court would not have subjected it to the lien, regardless of the real estate upon which it was situated. The defendant can not relitigate that question in this case. The position now taken by the defendants is subversive of both legal and equitable principles, and can not be looked upon with favor, or sanctioned by this court. *Brown v. Jones*, 55 N. W. Rep. [Minn.], 54.

It has been repeatedly held by us that replevin will lie to recover the possession of a building. *Mills v. Redick*, 1 Neb., 437; *McDaniel v. Lipp*, 41 Neb., at page 716, 60 N. W. Rep., 81; *Ellsworth v. McDowell*, 44 Neb., 707, 62 N. W. Rep., 1082. An action of replevin may be maintained

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for property which, as between the parties, is personalty. *McDaniel v. Lipp, supra.*

As we have heretofore stated, the judgment in the mechanics' lien case as between the parties therein and to this suit, fixed and determined the nature of the property in question; and it not having been made to appear that at the time of the commencement of this suit the building was occupied as a family dwelling this action can certainly be maintained.

We therefore hold that the court erred in directing a verdict for the defendant, and we recommend that the judgment of the district court be reversed, and the cause remanded for a new trial.

POUND and OLDHAM, CC., concur.

REVERSED AND REMANDED.

CHRISTIAN F. SCHEEL V. AUGUST LACKNER ET AL.

FILED FEBRUARY 4, 1903. No. 12,567.

Commissioner's opinion. Department No. 2.

1. **Homestead: FRAUDULENT CONVEYANCES.** The homestead of a debtor to the extent and value of \$2,000 is not the subject of fraudulent alienation.
2. **Homestead: ALIENATION: PURCHASE OF OTHER LAND: CONVEYANCE TO WIFE.** The debtor may invest the proceeds of such homestead in other land at any time within six months after the alienation thereof, or may exchange it for other land, and cause the same to be conveyed to his wife, and she will be entitled to hold such land to the amount of \$2,000, free and clear of his debts.

ERROR from the district court for Jefferson county.
Tried below before LETTON, J. *Affirmed.*

E. H. Hinshaw and *A. R. Scott*, for plaintiff in error.

R. A. Clapp and *J. C. Hartigan*, contra.

BARNES, C.

This was an action in the nature of a creditors' bill, brought in the district court of Jefferson county, by the plaintiff in error against the defendants August Lackner and his wife, Annie, to set aside a deed to the wife, of eighty acres of land situated in that county, and subject said land to the payment of a judgment in favor of the plaintiff and against the husband. At the conclusion of the trial the court, upon the evidence, found the following facts:

"1. The court finds that on the 6th day of April, 1896, the defendant, August Lackner, purchased from one Amelia Zieman the south half of the northeast quarter of section twelve, township four north, range one east, in Jefferson county, Nebraska, for the sum of \$2,400, \$1,700 of which was paid by the assumption of certain mortgages to that extent then existing upon said property, and the remaining \$700 was to be paid to the said Amelia Zieman.

"To secure the payment of said \$700 the defendants, August Lackner and Annie Lackner, his wife, executed a deed to the said Amelia Zieman of a certain eighty acre tract of land in Saline county, Nebraska, which the said August Lackner and Annie Lackner then occupied as their homestead.

"2. The court further finds that the eighty acres of land in Jefferson county was, at the request of August Lackner, conveyed by the said Amelia Zieman to his wife, Annie Lackner, with the intent and purpose of placing the same beyond the reach of the plaintiff, Scheel.

"3. The court further finds that at the time the purchase of the said eighty acres of land in Jefferson county was made by the said August Lackner, the said August Lackner had incurred a liability to the plaintiff, Christian F. Scheel, by reason of the conversion of certain goods and chattels of said Scheel to his own use; and that afterwards, on the 14th day of February, 1900, the said plaintiff recovered a judgment in the district court of Saline county,

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Nebraska, against said August Lackner for the conversion of said goods for the sum of \$1,792 and costs of suit taxed at \$42, which judgment still remains in full force and effect, and wholly unsatisfied.

"4. The court further finds that afterwards the plaintiff caused a transcript of said judgment to be filed in the district court of Jefferson county; that afterwards he caused executions to be issued both in Saline county and Jefferson county, upon said judgments which were returned wholly unsatisfied.

"5. The court further finds that at the time that said August Lackner and Annie Lackner executed the conveyance of the eighty acre homestead in Saline county, Nebraska, said eighty acres were incumbered by mortgage to the amount of nearly \$1,700 and that the total value of said eighty acres did not exceed \$2,400; and that said eighty acre homestead in Saline county, Nebraska, was absolutely exempt to the said August Lackner and Annie Lackner, and was incapable of fraudulent alienation."

These facts fully state the case. The conclusions of law based upon the foregoing are stated in the sixth finding, which is as follows:

"6. The court further finds that since the plaintiff, Christian F. Scheel, was not entitled to enforce his judgment against the eighty acres of land in Saline county by reason of its homestead character, he is not entitled to follow the proceeds of the same; and that by the procuring of the title to the tract of land in controversy in this case to be made to his wife, Annie Lackner, the defendant, August Lackner, was not guilty of any fraud or violation of the rights of the plaintiff, Christian F. Scheel, and there is no equity in the plaintiff's bill."

The plaintiff's exceptions were overruled, and thereupon the following judgment was rendered:

"Wherefore it is considered, ordered and adjudged by the court, that the plaintiff, Christian F. Scheel, take nothing by his bill, that his action be, and is hereby dismissed, at the costs of the said plaintiff, taxed at \$52.30."

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A motion for a new trial was filed and overruled, exceptions were taken, and the plaintiff thereupon brought the case to this court by a petition in error.

An examination of the record discloses that the findings of facts are fully sustained by the evidence. No serious objection is urged to any of them, but it is contended that the court erred in his conclusions of law and in his judgment rendered thereon. It is insisted by the plaintiff that the finding that the title to the land, at the request of the judgment debtor, was put in the name of the wife to place the property beyond the reach of the plaintiff, is sufficient to require the court to set aside the deed and subject the property to the payment of the plaintiff's judgment; that the deed of the land in Saline county, which was the homestead of the defendants, was only a mortgage, and that by reason thereof they did not part with the title to their homestead, and the judgment of the court gives them two homesteads which they are not entitled to have. We can not agree with these contentions. It is established beyond question that the land in Saline county was the homestead of the defendants; that it was worth only about \$2,400, and that it was incumbered by a mortgage of \$1,700. This would leave \$700 as the equity of the defendants in their Saline county homestead. In any event, this equity in the homestead would be exempt to them, and would not be the subject of fraudulent alienation. Whether the deed to the homestead, which was given as a consideration for \$700 of the purchase price of the land in question, was a mortgage or not, makes no difference so far as the rights of the parties are concerned. The land situated in Jefferson county sought to be subjected to the payment of the plaintiff's judgment, was worth only about \$2,400 at the time it was purchased; it was incumbered by mortgages to the amount of \$1,700, which the defendants assumed. Therefore the equity in this land was no greater than their equity in their Saline county homestead. The effect of the transaction was to pay an equity of \$700 in the land in question. It was simply

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transferring the equity in the Saline county land, which was exempt as a homestead, and not subject to fraudulent alienation, into an equity in the land in question, and no matter what the intention of the defendant Christian F. Scheel was, the plaintiff herein has no cause of complaint. *Mundt v. Hagedorn*, 49 Neb., 409; *Munson v. Carter*, 40 Neb., 417. The interest of the defendants in their Saline county homestead was absolutely exempt, and the plaintiff's judgment was no lien thereon. *Hoy v. Anderson*, 39 Neb., 386; *Corey v. Plummer, Perry & Co.*, 48 Neb., 481; *Prugh v. Portsmouth Savings Bank*, 48 Neb., 414; *Mundt v. Hagedorn*, *supra*; *Horbach v. Smiley*, 54 Neb., 217; *Farmers' Loan & Trust Co. v. Schwenk*, 54 Neb., 657; *Smith v. Neufeld*, 57 Neb., 660.

The land in suit represented the proceeds of the transfer of the homestead. These were exempt to defendant Lackner to be disposed of as he saw fit, at any time within six months after the date of the transaction. He gave the land obtained by the transfer of their homestead, to his wife Annie Lackner; this he had a perfect right to do. The money received from the sale of the homestead to the amount of \$2,000 was exempt for the period of six months thereafter, and was entitled to the same protection against legal process and the voluntary disposition of the claimant, which the law gives to the homestead itself. Section 16, chapter 36, Compiled Statutes [Ann. St. sec. 6215].

The plaintiff had no right to complain because the land purchased by the proceeds of the homestead in Saline county was conveyed to the wife. *Frazier v. Syas*, 10 Neb., at page 117; *Gillespie v. Brown & Ryan Bros.*, 16 Neb., 457, 20 N. W. Rep., 632; *Bloedorn v. Jewell*, 34 Neb., 649, 52 N. W. Rep., 367.

It has become the well settled law of this state that a husband may purchase other land with the proceeds of his homestead, which were absolutely exempt as such, and have the same conveyed direct to his wife; such conveyance will not be considered fraudulent, and she will be entitled to hold the premises to an amount and value not

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exceeding \$2,000, free and clear of all of his debts. *Bloedorn v. Jewell, supra.*

We therefore hold that the judgment of the trial court was right, and we recommend that it be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

WILLIAM H. COLE V. ADAMS COUNTY, NEBRASKA, ET AL.

FILED FEBRUARY 4, 1903. No. 12,572.

Commissioner's opinion. Department No. 3.

Appeal and Error: ASSIGNMENTS: OVERRULING MOTION FOR NEW TRIAL.

Errors required to be assigned in a motion for a new trial, will be deemed waived, unless the ruling on such motion is assigned as error in this court.

ERROR from the district court for Adams county. Tried below before ADAMS, J. *Affirmed.*

J. W. James, for plaintiff in error.

M. A. Hartigan, contra.

ALBERT, C.

In the oral argument in this case, our attention is called to the fact that the only errors assigned are those required to be assigned in the motion for a new trial. The ruling of the trial court on that motion is not assigned as error. Under the repeated rulings of this court the alleged errors can not, therefore, be considered. An examination of the record satisfies us that the application of this rule will work no hardship.

It is recommended that the judgment of the district court be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

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LOUIS JENSEN V. GEORGE STEIBER ET AL.

FILED FEBRUARY 4, 1903. No. 12,575.

Commissioner's opinion. Department No. 2.

1. Trial: INSTRUCTIONS: REPETITION IN DIFFERENT PARAGRAPHS. When the court in one paragraph of its instructions correctly states a rule of evidence, it is not erroneous to refer to the rule in apt terms in instructions immediately following, without repeating the rule in each of the instructions.
2. Trial: EVIDENCE: ADMISSIBILITY. Action of the trial court in admitting evidence examined, and *held* proper.

ERROR from the district court for Lancaster county:
Tried below before HOLMES, J. *Affirmed.*

Wilson & Brown, for plaintiff in error.

W. T. Stevens, contra.

OLDHAM, C.

In this action, plaintiffs sued the defendant for a bill of \$23.08 for threshing his wheat; defendant filed a counter-claim for damages for failure of plaintiffs to thresh his oats at the time agreed upon; there was judgment for plaintiffs, and defendant brings error to this court.

The first alleged error called to our attention in defendant's brief is as to the action of the trial court in giving the third paragraph of instructions on its own motion. This instruction says: "Therefore, if under this rule, you find and believe," etc., and it also says "provided you further find and believe," without making direct reference to the evidence in the case, as the source on which belief should be founded.

There might be some merit in this criticism if it were not for the rule that no instruction should be condemned which, when read in connection with those immediately preceding it, correctly states the law. The first paragraph of instructions given by the court told the jury, in sub-

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stance, that it was incumbent upon the defendant to establish his counter-claim by a preponderance of the evidence. The second paragraph said: "If under this rule," etc., and the instruction criticised follows with a clear reference to the rule properly announced in the first paragraph of instructions. Hence when this instruction is read as it should be in connection with those preceding it, it properly confines the belief of the jury to conclusions arising from the testimony.

When the court in one paragraph of its instructions correctly states a rule of evidence, it is not misleading to refer to this rule in instructions immediately following without repeating the rule in each of the instructions.

Complaint is made of the action of the trial court in permitting the following question to be answered by plaintiff, Henry McDonald, when on the witness stand:

Q. Did you agree at any time or promise to thresh Mr. Jensen's oats last fall?

A. No, sir; I did not.

While this question was leading in form, yet its object was to contradict the evidence of the defendant who had testified to the alleged agreement of the plaintiffs to thresh his oats. Another question propounded to this same witness, similar in nature and going to the same purpose, is also complained of. We see no error or prejudice in the action of the trial court in permitting the answers to these questions to stand. They were merely asked for the purpose of contradicting the testimony given by the defendant in chief; consequently, they are not obnoxious to any objection urged against them.

These being all the errors alleged against, we therefore recommend that the judgment of the trial court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

Stocker v. Coddington.

THOMAS B. STOCKER, APPELLANT, v. DELILAH CODDINGTON
ET AL., APPELLEES.

FILED FEBRUARY 4, 1903. No. 12,580.

Commissioner's opinion. Department No. 3.

Appeal and Error: TRIAL WITHOUT JURY: INFERENCES OF FACT. Inferences of fact drawn by a trial court without a jury, will not be disturbed by this court unless clearly wrong.

APPEAL from the district court for Nemaha county.
Tried below before LETTON, J. *Affirmed.*

S. P. Davidson, for appellant.

W. H. Kelligar and *E. Ferneau*, contra.

AMES, C.

This is an action by the appellant to restrain the appellee from maintaining a dyke or dam by means of which it is alleged that surface waters are wrongfully diverted from the lands of the latter to those of the former. Whether the structure has this effect is a question of fact which was decided by the trial court after hearing the testimony of witnesses and after visiting and inspecting the premises, during the progress of the trial, in company with counsel of the respective parties. We do not think that we are as competent to determine the controversy as was the trial judge and shall not undertake to review his decision.

Counsel for the appellant contends that certain special findings of fact by the trial court, if properly interpreted, establish the inference that the waters were so diverted although the district judge drew the contrary inference therefrom. Whether these findings will bear the construction put upon them by counsel, we do not feel called upon to inquire. The matter being one of inference only, and not of positive fact we think that, under the familiar rules

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of this court, the appellant must be content with the conclusion reached by the trier of fact.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

THOMAS B. STOCKER V. NEMAHA COUNTY ET AL.

FILED FEBRUARY 4, 1903. No. 12,593.

Commissioner's opinion. Department No. 1.

Waters and Water Courses: SURFACE WATERS: COUNTY DITCHES: LIABILITY. A county is not liable to landowners for injuries caused by the discharge of surface water from ditches constructed by the county authorities diverting such water from its natural course.

ERROR from the district court for Nemaha county. Tried below before STULL, J. *Affirmed.*

G. W. Cornell, for plaintiff in error.

E. B. Quackenbush, County Attorney, and *H. A. Lambert*, contra.

LOBINGIER, C.

This is an action for damages alleged to have been caused by reason of the defendant's construction of ditches in "upon or near" a public highway and the consequent diversion of surface water and discharge thereof upon plaintiff's land. There was a jury trial with a verdict and judgment for defendant. A large number of errors are assigned in the petition by which the cause is brought to this court. We find it unnecessary to consider these, however, because in our view there was no liability on the part of defendant for the injuries complained of. "It is the general rule that a county is not liable for torts in the absence of a statute expressly or by necessary implica-

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tion declaring the liability." 7 Am. & Eng. Ency. Law [2d ed.], 947.

As was said in *Hollingsworth v. Saunders County*, 36 Neb., at page 144, "It is perfectly plain that a county is not liable for the acts or negligence of its officers unless made so by legislative enactment." The same doctrine was applied in *Woods v. County Commissioners of Colfax County*, 10 Neb., 552, and *When v. Commissioners of Gage County*, 5 Neb., 494, and the reason for it is thus stated in *Madden v. Lancaster County*, 65 Fed. Rep., at page 191, a case arising in this state:

"Inasmuch as the sovereign power is not amenable to individuals for neglect in the discharge of public duty, and can not be sued for such neglect without express permission from the state itself, so these *quasi* corporations, its agents, are not liable for such negligence, and no action for damages arising therefrom can be maintained against any of them, in the absence of an express statute imposing the liability and permitting the action."

Defendant was therefore clearly subject to no common law liability for the acts complained of.

In 1889, the legislature passed a statute which now forms sections 114-117 of chapter 78 of the Compiled Statutes [Annotated Statutes, sections 6132-6135], which makes a county liable: "If special damage happens to any person, his team, carriage, or other property by means of insufficiency, or want of repairs of a highway or bridge."

We can not think that the injuries alleged in the petition are within the terms of this act. The complaint here is not by reason of "insufficiency" or "want of repairs" of the highway as such but on account of the construction of something in "upon or near" the highway but constituting no necessary part of it. In Iowa where counties have been held liable for the negligent construction of bridges, it is nevertheless held that there can be no recovery for the negligent maintenance of a ditch by the county as a result of which land is overflowed. *Green v. Harrison County*, 61 Ia., 311; *Nutt v. Mills County*, 61 Ia.,

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754; *Dashner v. Mills County*, 88 Ia., 401. Compare *Packard v. Voltz*, 94 Ia., 277; *Crowell v. Sonoma County*, 25 Cal., 313.

Plaintiff's original petition appears to have been drawn with a view to seeking an injunction to prevent defendant and its officers from causing the water to flow upon plaintiff's land. Had this course been followed and the relief sought restricted to an injunction, plaintiff's reference to *Young v. The Commissioners of Highways of Maquon Township*, 134 Ill., 569, would have been applicable here. For the fact that defendant is not liable in damages would in no way prevent defendant's obtaining equitable relief in a proper case. Indeed, the fact that neither the common law nor the statute affords a remedy is the strongest reason for granting an injunction. But as this is merely an action at law to enforce a liability for which no basis exists either at common law or by statute, we recommend that the judgment be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

PHOENIX INSURANCE COMPANY OF BROOKLYN, NEW YORK,
v. W. H. RADFORD.

FILED FEBRUARY 17, 1903. No. 12,336.

Commissioner's opinion. Department No. 1.

1. **Insurance: AGENCY: AUTHORITY TO CANCEL POLICIES.** There is no presumption that an agent of an insurance company authorized to solicit insurance, has authority to cancel policies of insurance upon request of the insured.
2. **Insurance: AGENCY: AUTHORITY OF AGENT: EVIDENCE INSUFFICIENT.** Evidence examined and found insufficient to sustain the verdict and judgment.

ERROR from the district court for Kearney county.
Tried below before ADAMS, J. *Reversed.*

G. L. Godfrey, for plaintiff in error.

E. C. Dailcy, contra.

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KIRKPATRICK, C.

On March 30, 1901, The Phoenix Insurance Company of Brooklyn, New York, filed its petition in the district court for Kearney county, against W. H. Radford, alleging its corporate character and its authority to do business in the state of Nebraska, and that on the 4th day of January, 1895, the defendant executed and delivered to plaintiff, for a valuable consideration, his promissory note for \$96.25, drawing interest at six per cent. per annum. The petition admitted that on the 29th day of April, 1896, the defendant paid on the note the sum of \$25, and prayed judgment for \$96.25, with interest less the credit admitted.

The defendant in answer pleaded as an affirmative defense that the note sued on was given by him for insurance premium on an insurance policy dated January 4, 1895, running for five years, and that during the month of April, 1896, the defendant, desiring to cancel the policy, paid to plaintiff the full amount claimed by plaintiff to be due upon the policy, the plaintiff thereupon agreeing to cancel the policy and return the note, but that the note was not returned, plaintiff refusing and neglecting to return the same. The plaintiff filed for reply a general denial. Trial was had to a jury, and there was a verdict and judgment for defendant, with judgment for costs against plaintiff.

The error urged by plaintiff in this court is that the verdict is not sustained by sufficient competent evidence, and this alleged error involves the further question whether payment of the short rates due from defendant at the time of alleged cancellation made to the agent of the plaintiff company can in law be deemed payment to the company.

From the evidence of defendant Radford, it appears that some time after the policy was issued he rented his farm and the buildings thereon to other parties, selling to them the larger portion of his stock. The insurance in plaintiff company covered these buildings and stock. He

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stated to the agent through whom the policy was issued, who was the authorized representative of plaintiff company, that the change in his affairs made the policy worthless to him, and further, that he could not act upon the suggestion of plaintiff's agent to transfer the policy to some other property because he had none. It was finally agreed to cancel the policy, the agent figuring out the amount necessary under the customary short rates, less the amount already sent to the company, defendant paying this sum to the agent, together with a small fee demanded by the latter. The agent promised to secure the note and return it, but failed and neglected so to do.

A letter from the agent is in the record, and by stipulation of parties is given the force of a deposition of the facts therein stated. In this letter the agent denies the transaction alleged by defendant with reference to cancellation and payment of short rates, but says that he did about that time cancel another policy held by defendant in another company. This latter testimony is, in turn, denied by defendant. It is apparent from the verdict that the jury credited the testimony of defendant and, so far as this controverted fact is concerned, their verdict is conclusive.

The question for determination is whether the agent, authorized by the company to solicit insurance risks, take applications, and to whom the policies issued thereon, if accepted, were sent, to be delivered to the insured, and to whom the policy in this case was sent, and by whom it was delivered to defendant, was also authorized to cancel the policy upon demand of the insured, and upon payment by the latter of the short rates. The testimony in the case wholly fails to show any authority on the part of the agent to receive or act upon a request for cancellation of the policy and repayment of the unearned premium. The only circumstance in the case is that McGinnis, the soliciting agent who wrote the insurance, said that he had authority to receive a request for cancellation, and that he assumed to act in the matter as though authorized by the company,

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computing the amount due on the short rates and accepting the money from defendant. It is admitted that defendant never surrendered his policy, and there is a total want of evidence tending to show that McGinnis, who assumed to act as agent, ever forwarded the money to the insurance company, and the evidence is equally silent with reference to a showing that a request for cancellation was ever presented to the company or anyone authorized to act for it. In this condition of the evidence it follows that the verdict is unsupported, unless there is a presumption that the agent was authorized to receive requests for cancellation founded on the fact that he was authorized to solicit insurance. There can be no doubt that the rule is otherwise. The agent in this case was authorized to solicit insurance, but no presumption follows that he was also authorized to cancel the policy upon request of the insured.

For failure of sufficient evidence to support the judgment of the district court, the same should be reversed.

HASTINGS, C., concurs.

REVERSED AND REMANDED.

FRANK E. MOORES, MAYOR OF THE CITY OF OMAHA V. STATE
OF NEBRASKA, EX REL. W. W. COX.

FILED FEBRUARY 17, 1903. No. 12,433.

Commissioner's opinion. Department No. 1.

1. **Mandamus: ADEQUATE REMEDY AT LAW: STATUTES.** Section 646 of the Code of Civil Procedure prevents the issuance of a mandamus in any case where the relator has a plain and adequate remedy in the ordinary course of law.
2. **Municipal Corporations: MANDAMUS: FOR SALARY: NO SALARY ATTACHED: RIGHT TO WRIT.** An application for a mandamus and evidence introduced under it, which both fail to show a definite salary attached to an office so that by the lapse of time and the operation of law a fixed sum will become due the incumbent, do not disclose a right to a mandamus to compel a city or its officers to issue a warrant for salary.

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3. Municipal Corporations: MANDAMUS: FOR SALARY: EVIDENCE INSUFFICIENT. Evidence held insufficient to show relator's incumbency in an office with sufficient certainty to entitle him to a mandamus for salary.

ERROR from the district court for Douglas county. Tried below before BAXTER, J. *Reversed and dismissed.*

W. J. Connell, for plaintiff in error.

The defendant in error, by accepting and acquiescing in his discharge, and taking employment elsewhere is estopped from denying that he was discharged. *Cain v. Boller*, 41 Neb., 721; *Blodgett v. McMurtry*, 34 Neb., 782; *Brown v. Eno*, 48 Neb., 538.

Mandamus will not lie for collection of salary. High, Extraordinary Legal Remedies [3d ed.], section 341; 2 Dillon, Municipal Corporations, section 831; *State v. City of Kansas City*, 17 Pac. Rep. [Kan.], 185.

L. D. Holmes, contra.

The defendant in error was unlawfully prevented from performing the duties of his office. He did not abandon his office by accepting other employment, and is entitled to his salary during all the time he was entitled to the office, undiminished by any amount he may have earned during said time. Mechem, Public Officers, section 855; *Steubenville v. Culp*, 38 Ohio St., 18; *Fitzsimmons v. City of Brooklyn*, 102 N. Y., 536, 55 Am. Rep., 835; *Everill v. Swan*, 57 Pac. Rep. [Utah], 716; *People v. Miller*, 24 Mich., 457; *Andrews v. Portland*, 79 Me., at page 489; *Dorsey v. Smyth*, 28 Cal., 21.

Mandamus is a proper remedy to compel the proper officers to make out and deliver to the city council a payroll and certificate showing the relator to be entitled to the payment of his salary. High, Extraordinary Legal Remedies [3d ed.], section 105; *Kendall v. Raybould*, 44 Pac. Rep. [Utah.], 1034; *State v. Board of County Commissioners of Cass County*, 53 Neb., 767; Spelling, Injunctions

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and Other Extraordinary Remedies [2d ed.], section 1492; *People v. Board of Police*, 75 N. Y., 38; *People v. Common Council of Buffalo*, 16 Abb. [N. Cas.] 96; *McBride v. City of Grand Rapids*, 47 Mich., 236; *Reynolds v. Taylor*, 43 Ala., 420.

HASTINGS, C.

The relator in this case applied for a writ of mandamus to compel allowance of his claim for salary in the sum of \$585 as a sergeant of police of the city of Omaha from April 14, 1898, to November 1, 1898, and issuance of a city warrant for the amount. In his petition for the writ he states his appointment on September 17, 1895, by the board of fire and police commissioners of the city as a member of the police department and that he was ordered to discharge the duties of chief of detectives and sergeant of police; that he filed his bond, took the oath of office and entered upon the discharge of his duties and remained in said position, discharging all its duties from that time until November 1, 1898; that he received his salary until April 14; that on that date the board passed a resolution abolishing the office of chief of detectives and immediately thereafter the board, through the chief of police informed him that his services were not needed and that he was discharged; that all this was without any charges against him or hearing upon such charges, and that he could find no record of any discharge from the police force on the records of the board; that up to November 1 he was ready and willing to perform any duty to which he might have been assigned, but was not recognized as a member of the department and not assigned to any duty by the board or by the chief of police. He states that there is due him \$585 for salary as sergeant of police during the time mentioned; that he has requested payment of it and on March 11, 1899, made a written demand upon the defendant, the mayor and the board, and that they have neglected and refused to allow or pay any part of it; that he was a citizen of the state and of the United States and

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a qualified elector in Omaha, competent, ready and willing to perform all the duties of a sergeant of police. Attached to this application was his written demand for salary at the rate of \$90 per month as sergeant of police for the city during the time stated. The briefs state that a demurrer was filed and overruled, but we are unable to find any mention of it in the record. The application was filed April 29, 1899; June 16, 1900, defendants, Moores, Kennedy and Collins, answered setting out that the defendant Karbach, was deceased and Coffman had resigned as a member of the board; they admitted that relator was acting as chief of detectives on the police force of the city up to April 14, 1898; that his salary up to that time was paid; they admit that on that day by resolutions of the board the office of chief of detectives was abolished and any further detective services were directed to be performed by the detailing of men for that duty from members of the force, and that such action was taken in good faith and in the interest of economy and good order in the city of Omaha; that relator was immediately informed by said board through the chief of police that he was discharged and dropped from the service; that he performed no duty until November 1, 1898, when he was appointed captain of police to fill a vacancy and thereupon he re-entered the said service and remained until he was discharged for cause; they say that he acquiesced in and accepted such action of the defendants and engaged in other employment and made no claim for compensation or salary for the period between April 14 and November 1, 1898, until after his final discharge for cause as above stated. They say that by reason of his making no claim and not commencing this proceeding within a reasonable time and by reason of his conduct in accepting such action on the part of the board, and because of his laches he is estopped from maintaining or continuing this claim and they deny that there is due him from the city of Omaha \$585 or any sum whatever as salary. They admit that he was appointed a member of the police department of the city to fill the position

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and discharge the duties as chief of detectives September 17, 1895, that from May 10, 1897, to September 30, 1897, his duties were suspended by judgment of the board removing him and he was not a member of the police department; that he was removed from the board by orders dated May 10, 1897, and also September 29, 1897, by a judgment which is still in force and effect but said judgment was not carried into effect because of certain injunction proceedings which were for a long time pending but which have since been finally determined and conclusively dismissed by the action of this court on appeal. The defendants also deny generally and assert that the application for the writ does not state facts sufficient to constitute a cause of action or to entitle the relator to a mandamus. This answer was denied.

Upon these pleadings a hearing was had and on May 13, 1901, a peremptory writ of mandamus was allowed requiring the defendants to make out a proper pay roll and certificate for relator as sergeant of police for \$585 and interest at seven per cent., from November 1, 1898, and the city to issue and deliver a warrant for said sum and interest. Motion for new trial on the grounds that the judgment was not sustained by sufficient evidence, that it was contrary to law, errors of law occurring at the trial and excepted to by defendant, error in the amount of recovery, was filed and overruled, and the defendants bring error.

At first view it seemed that this action would not lie under section 646 of the Code, which provides that the writ of mandamus may not issue in any case where there is a plain and adequate remedy in the ordinary course of the law. It seemed that the right of the relator to his salary as against the city was in question and not merely his right to action by these ministerial officers through whom that salary was to be paid. It seems clear that under this provision of the Code, and the decisions of this court under it, there could be little question that so long as the right against the city was in dispute resort should be had to the

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ordinary action at law. 2 Dillon; *Municipal Corporations* [4th ed.], section 831; *State v. The Mayor and City Council of Lincoln*, 4 Neb., 260; *Horton v. State*, 60 Neb., 701.

A similar holding in Kansas is found in *State v. City of Kansas City*, 17 Pac. Rep., 185. Of course, it is well established in modern practice that mandamus is no longer to be regarded merely as a prerogative writ to be used in vindication of a public right but as one of the forms of action between ordinary parties. *Commonwealth of Kentucky v. Dennison*, 24 How. [U. S.], 66. In this case, it appearing that the defendants chose to answer to the merits and to litigate the right of relator to the writ, it would seem that justice requires that this be considered as a submission of the question of the relator's right to his salary under this evidence. The allegations of the relator however seem insufficient on any view of the case to entitle him to the writ. He has nowhere alleged that any definite salary is attached by law to the office of sergeant of police. The reason for permitting officers to collect their salary by mandamus is that the salary is to be esteemed a mere incident to the office; the holding of the office and the lapse of time are supposed to establish an absolute right to a salary conferred by law upon the incumbent. The writ of mandamus can be used only to enforce absolute legal relations and not equitable ones. *State v. Wenzel*, 55 Neb., 210. Unless then an absolute legal right to this money by provisions of law or by statute or ordinance is set forth no right to a mandamus to collect it is disclosed. As above stated there is no allegation that any fixed salary is attached to the office of sergeant of police. There is an allegation that the relator had received \$90 per month as chief of detectives and sergeant and there is the conclusion stated that there is due him \$585 for the time between April 14, and November 1, 1898, but it is also set forth that his position as chief of detectives was abolished and there is no allegation of any specific salary as attached to the office of sergeant of police. It would seem that on any view that may be taken of the law the relator's allegations are insufficient.

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The objection that there is no right to the writ as above shown, appears in the answer and, as before stated, there is reference made to a demurrer which was overruled, but as nothing appears in the record, we suppose that this has reference to the demurrer incorporated in the answer. The defendants insist that the evidence no more than the pleadings, disclosed either statute or ordinance attaching any fixed salary to the position of sergeant of police. We are unable to find anything of the kind in the record. As above stated, none has been cited to us, and we are not able to discover any provisions in the statute as to the salary of such an officer. It seems clear that no mandamus for the payment of any particular sum can be sustained upon such a record.

So far as the merits of the case are concerned, aside from this question of the amount, the question at issue is whether or not during the time mentioned the relator was a sergeant on the city's police force? His appointment was, as he alleges, in 1895 and was, as it appears from the record of the board, as follows:

"The following appointments are hereby made and the appointees will qualify and report at once for duty: Henry P. Haze, captain of police; W. W. Cox, sgt. and chief of detectives; A. A. Bebout, sergeant."

His discharge, as is claimed, was by the following provision:

"Resolved, That the office of chief of detectives is hereby abolished, and in lieu thereof the following rule with regard to rank and promotion is hereby adopted."

This record discloses that an attempt had been made to remove him the previous year and he at once instituted quo warranto proceedings against his successor to recover "the office of chief of detectives of said city" and recovered it. The following day after the passage of the resolution to abolish such office, he was informed that the office had been abolished and his further services were not needed, and that he was discharged; he thereupon entered the employment of Swift & Co., in South Omaha, and

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remained in such employment until he was appointed captain of police November 1. No question is any longer made as to the right of the board to do away with the office of chief of detectives and discharge its incumbent. The only question is whether they did discharge him in taking the action which has been stated. Passing the resolution and causing the chief of police to notify the incumbent that his services were not needed and that he was discharged would seem effectual to dispense with the holder's services in the police department in any capacity. Apparently it was so understood and accepted at the time. There seems to be no just liability on the part of the city to pay his salary.

It is recommended that the judgment of the district court granting a peremptory writ be reversed and set aside and the action dismissed.

KIRKPATRICK and LOBINGIER, CC., concur.

The judgment of the district court granting a peremptory writ is reversed and set aside and the action dismissed.

REVERSED AND DISMISSED.

SCHOOL DISTRICT NO. 1 OF SARPY COUNTY, NEBRASKA, APPELLEE, v. PATRICK D. MCCORMICK, APPELLEE, IM-
PLEADED WITH SCHOOL DISTRICT NO. 40 OF SARPY
COUNTY, NEBRASKA, APPELLANT.

FILED FEBRUARY 17, 1903. No. 12,527.

Commissioner's opinion. Department No. 3.

1. **Schools and School Districts: NEW DISTRICTS: TAXATION: STATUTES: CONSTRUCTION.** Section 11, subdivision 2, chapter 79 of the Compiled Statutes of 1897 [Annotated Statutes, 1903, section 11039]. deals exclusively with such taxes as it is contemplated the electors themselves shall vote, and the twenty-five mill limit imposed by

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said section does not apply to a tax certified to the county authorities by the county superintendent of schools upon the creation of a new district.

2. **Schools and School Districts: NEW DISTRICT: TAXATION: LIMITATION OF.** School District No. 40 was created by the county superintendent, a part of its territory being taken from district No. 1. The superintendent found that district No. 40 should receive from district No. 1 the sum of \$453.33 and that a tax of six mills on the dollar on the property of district No. 1 was necessary to raise the amount. District No. 1 voted a tax of twenty-five mills on the dollar and the county commissioners, supposing that they were limited to a levy of twenty-five mills for all purposes, levied twenty mills on the property of district No. 1 for general school purposes and five mills for the payment of its indebtedness to district No. 40. District No. 1 made claim to the whole tax. *Held*, That while the county board could have legally levied the full amount called for by the vote of the electors of district No. 1 and the amount certified by the county superintendent as necessary to pay district No. 40, that having failed to do so each district was entitled to the amount levied in its favor and no more.

—APPEAL from the district court for Sarpy county. Tried below before BAKER, J. *Reversed and dismissed.*

Will H. Thompson, for appellant.

Patrick & Fleharty, contra.

DUFFIE, C.

In 1897 the county superintendent created school district No. 40, said district being formed in part out of territory formerly belonging to district No. 1. Acting under the provisions of section 9 of chapter 79 of the School Laws, the superintendent determined that the newly created district should receive the sum of \$453.33 from district No. 1, and that a six-mill tax on the property of the latter district was necessary to pay the same. He certified his finding to the county clerk in the following words: "To the county clerk of Sarpy county: In the formation of School District No. 40 from parts of districts numbers 1 and 40 I find that School District No. 40 should receive as its share of the property retained by

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School District No. 1 the sum of \$453.33 which will require a tax of six mills in said School District No. 1."

This certificate was filed with the clerk November 15, 1897. For some reason the tax required by this certificate was not levied by the board of county commissioners and no attention was given the same until 1899, when proceedings were had relating thereto which we will notice hereafter. At the school district meeting held June 26, 1899, the voters of district No. 1 determined that twenty-five mills on the dollar of valuation should be levied for the ensuing year and a certificate of such action was filed July 1, 1899, with the clerk of Sarpy county.

At the time of levying taxes for the year 1899 the county commissioners, in the honest belief, no doubt, that school district taxes to exceed twenty-five mills could not be levied, made a levy on the property of district No. 1 in the following form:

"For Teachers Fund and other purposes.....20 mills

"For Indebtedness to District No. 40..... 5 mills

"Total25 mills"

After a part of the above specified taxes had been paid, the plaintiff and appellee commenced an action in the district court to enjoin the treasurer of Sarpy county from paying over any part of the school district taxes levied and collected or to be collected in district No. 1 to district No. 40, and from a decree granting a perpetual injunction to that effect school district No. 40 has taken an appeal to this court.

In order to properly understand the question raised it will be necessary to examine several sections of our school laws relating to the division of school districts and the raising of funds by taxation for their support.

Section 9, subdivision 1, chapter 79 of the Compiled Statutes [Annotated Statutes, section 11008] provides that the county superintendent of schools, on the formation of a new district which is created in whole or in part from one or more districts possessed of school house or

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other property, shall ascertain and determine the amount justly due to such new district from any district or districts out of which it may have been in whole or in part formed.

Section 11, subdivision 1, chapter 79 [Annotated Statutes, section 11010], is as follows: "The amount of such proportion, when so ascertained and determined, shall be certified by the county superintendent to the county clerk, who shall present the said amount to the county board at the session next succeeding, whose duty it shall be at the proper time or times to assess the same upon the taxable property of the district retaining the school house or other property of the former district, in the same manner as if the same had been authorized by a vote of such district, and the money so assessed shall be placed to the credit of the new district."

Section 11, subdivision 2, of chapter 79 [Annotated Statutes, section 11039], as it read at the date the tax in question was voted by district No. 1, is as follows:

"Section 11. The legal voters at any annual meeting shall determine by vote the number of mills on the dollar of the assessed valuation which shall be levied for all purposes—except for the payment of bonded indebtedness and purchase or lease of school house—which number shall not exceed twenty-five (25) mills in any one year. The tax so voted shall be reported by the district board to the county clerk, and shall be levied by the county board, and collected as other taxes."

It will be seen that the county board ignored both the certificate of the school district and of the county superintendent, the former calling for a levy of twenty-five mills for school purposes, and the latter for a levy of six mills for indebtedness to district No. 40, and, while the levy was made for twenty-five mills only, the amount realized from twenty mills of this levy could be paid to district No. 1, while the amount realized from six mills of the levy was to be paid to district No. 40 according to the action of the board.

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The appellant insists that the fund realized from this levy should be distributed between the two districts as directed by the board; that it had no authority to levy a larger amount, and that the tax realized from five mills of the levy must, so far as it will do so, be used to discharge the indebtedness due to district No. 40.

On the other hand the appellee argues that district No. 1 had a right under the statute to vote a tax of twenty-five mills for school purposes in addition to any amount certified by the county superintendent as due from that district to district No. 40; that it was the duty of the county board to levy this amount for its benefit and that having done so it is entitled to the whole tax derived from the levy, ignoring what it asserts was an unauthorized act on the part of the county board in dividing the levy and designating the use to which it should be applied.

The appellant relies upon *Darson County v. Clark*, 58 Neb., 756, in which it was held that "a tax to pay a judgment against a school district can not be levied and collected where the maximum amount of taxes authorized by statute for all purposes has already been levied." In that case the county commissioners levied a tax of twenty-five mills on the dollar for school district purposes, ten mills for the payment of bonds, and twenty mills for the payment of judgments against the district. The levy for the payment of judgments was held illegal on the ground that the district had exhausted its power to tax by the vote of twenty-five mills for school district purposes. This, it is said, is an authoritative declaration that no tax in excess of the twenty-five mills authorized by section 11, subdivision 2, chapter 79, Compiled Statutes [Annotated Statutes, section 11039], can be levied in favor of a school district except for bonded indebtedness and for the lease or purchase of a school house. The question, while not free from difficulty, can, we think, be solved, and the intention of the legislature arrived at from the language used and the method provided to certify to the county authorities the number of mills to be levied.

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Section 11, subdivision 2, chapter 79, above quoted, deals exclusively with such taxes as first require a vote of the legal electors of the district. As stated by NORVAL, J., in *Dawson County v. Clark*: "These sections (referring to sections 11 and 12, subdivision 2, chapter 79), it is very evident, contained two restrictions upon the taxing power of a school district: First—Under neither section is authority given to levy a tax unless the same has been sanctioned by the legal voters at the annual school meeting."

The amount of tax, then, that may be voted by the electors for all purposes on which a vote of the electors is first required, is plainly limited to twenty-five mills except for the payment of bonds or the purchase or lease of a school house, and as the statute relating to the levy of a tax to pay a judgment requires action to be first taken by the municipality against which the judgment stands, it is equally apparent that a levy for the payment of a judgment against a school district comes within the limitation of said section and a levy for that purpose, together with such other taxes as the electors may vote, can not exceed the twenty-five mill limit.

The tax required to pay an indebtedness found by the county superintendent to exist in favor of a newly established district against one or more older districts out of whose territory it was created does not require any action of the electors, nor is it in any manner controlled or limited by their action. The county superintendent certifies the amount of such indebtedness, together with the mill levy required to raise the amount, directly to the county clerk and that certificate not only authorizes, but imposes on the county board the duty to levy the tax. This course of proceeding makes it evident that the levy certified by the superintendent of schools was intended to be exclusive of the twenty-five mill levy which the electors themselves may vote.

If this were not so some provision would undoubtedly have been made for notice to the district or its officers of the amount found necessary by the superintendent to pay

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newly created districts. There is no provision of the statute requiring either the county superintendent or the county clerk to notify the school district authorities of the amount necessary to vote in favor of the newly created district, and it is not to be supposed that the legislature intended that the electors in voting a tax should be limited in the amount voted by a levy instituted by another officer and the amount of which there is no provision in the law for bringing to their notice, and of which amount we must presume from the state of the law they have no knowledge.

We have concluded therefore that the twenty-five mill limit imposed by section 11, subdivision 2, chapter 79, Compiled Statutes [Annotated Statutes, section 11039], relates only to taxes which the electors themselves are called upon to vote, and which can not be legally levied by the county authorities except upon a vote of the electors. If this is a correct construction of the statute it follows that it was the duty of the county commissioners to have levied the twenty-five mills voted by district No. 1 and the six mills certified by the county superintendent as necessary to pay the amount due from that district to district No. 40. By proper proceedings district No. 1 could have compelled a levy of the full amount voted by the electors of that district, and district No. 40 could in like manner have compelled a levy of the amount certified in its favor. Neither district took any action to this end and the presumption must obtain that each was at the time of the levy satisfied with the action of the county commissioners.

The tax, to the extent that it was levied, is a valid tax the only complaint that either district can make being that the commissioners did not make a sufficient levy. In this condition of the case we can not see how district No. 1 can claim the whole fund or how the county officials can treat the levy as made for district No. 1 exclusively. As well might district No. 40 claim sufficient of the tax levied for district No. 1 to make up the six mills certified in its favor by the county superintendent, and no one will urge that such a claim could be successfully made.

Peterson v. Ferbrache.

We recommend that the decree of the district court be reversed and the case dismissed.

AMES and ALBERT, CC., concur.

REVERSED AND DISMISSED.

NELS PETERSON V. GEORGE W. FERBRACHE ET AL.

FILED FEBRUARY 17, 1903. No. 12,543.

Commissioner's opinion. Department No. 3.

Contracts: EVIDENCE OF CONTEMPORANEOUS ORAL AGREEMENT. Evidence of a contemporaneous oral agreement is inadmissible to contradict or vary the terms of a written contract.

ERROR from the district court for Lincoln county. Tried below before GRIMES, J. *Reversed.*

L. E. Roach, for plaintiff in error.

Neville & Parsons, contra.

ALBERT, C.

The allegations of the petition in this case are, in substance, as follows: that on the 19th day of April, 1900, the defendant Ferbrache, executed to the plaintiff his note for \$150 and to secure the payment thereof, gave the plaintiff a chattel mortgage on ninety-nine head of cattle subject to a prior mortgage in favor of the defendant bank; that afterward the defendants sold and disposed of the cattle covered by the mortgage and converted all of the proceeds to their own use to the damage of the plaintiff in the sum of \$118.

One of the defenses interposed by Ferbrache, is that at the time the note was signed it was expressly agreed between himself and the plaintiff, that the plaintiff should give him a written agreement to the effect that nothing

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should become due or payable on the note unless such defendant should realize, from a sale of the cattle covered by the mortgage, \$500 over and above the amount required to discharge the bank's mortgage; that the plaintiff refused to sign such an agreement and the note and mortgage in controversy were not delivered to him until June 9, 1900, at which time he verbally agreed that nothing should become due or payable on the note unless the defendant should realize the amount hereinbefore specified from a sale of the cattle. The defendant, Ferbrache, also pleaded a counter-claim amounting to \$84. The jury found for the defendants and allowed the defendant Ferbrache, the full amount of his counter-claim, of which amount \$3 were afterward remitted, and the court gave judgment accordingly. The plaintiff brings error.

One assignment of error relates to the admission of evidence as to the oral agreement alleged to have been made at the time the note and mortgage were delivered. That such evidence was inadmissible is elementary and the rule to that effect has been so often reiterated by this court that to cite authorities in support of it would seem like a vain display of industry. The admission of this evidence was prejudicial because the jury allowed the plaintiff nothing on his note, but allowed the defendant the full amount of his counter-claim. The other errors assigned are not such as are likely to arise in another trial of the case. For that reason it would serve no useful purpose to discuss them.

It is recommended that the judgment of the district court be reversed, and the cause remanded for further proceedings according to law.

AMES and DUFFIE, CC., concur.

REVERSED AND REMANDED.

Pope v. Whitcomb.

JOHN D. POPE V. EDWARD WHITCOMB ET AL.

FILED FEBRUARY 17, 1903. No. 12,596.

Commissioner's opinion. Department No. 2.

Trial: EVIDENCE CONFLICTING: DIRECTING VERDICT. Where the evidence on a material act is conflicting, and different minds might draw different conclusions or inferences therefrom, it is error for the court to direct a verdict for either party.

ERROR from the district court for Saline county. Tried below before STUBBS, J. *Reversed.*

F. I. Foss, J. D. Pope, A. S. Fands, B. V. Kohout and R. D. Brown, for plaintiff in error.

Abbott & Abbott, contra.

BARNES, C.

This action was commenced by the plaintiff in error against the defendants, Edward Whitcomb and Hannah Whitcomb, in the district court for Saline county, to recover a balance of \$527, alleged to be due him on account for services rendered them as attorney in the matter of the estate of one Henry Fletcher, deceased, which services it was alleged were performed by him at their special instance and request in the courts of the state of Illinois. The petition was evidently drafted on the theory of mutual accounts between the parties, and it was alleged that the plaintiff had credited the defendants with the sum of \$1 for each of the years from 1893 to 1900 inclusive, to wit, the total sum of \$8 for and on account of his subscription to their newspaper which he subscribed for and received during that time. The answer of the defendants was first a denial that they had ever employed the plaintiff in the matter of the estate of Henry Fletcher, and alleged that whatever services he performed in the matter were voluntary, and that he had agreed to charge nothing therefor; and second, a plea of the statute of limitations. The re-

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ply of the plaintiff was a denial of the fact set forth in the defendants' answer, together with some additional matter not necessary to be here considered.

The cause was tried, on these issues, to a jury, and at the conclusion of the introduction of the evidence the defendants moved the court to instruct the jury to return a verdict in their favor for the reason that plaintiff had failed in his proof to make a case against them, and for the further reason that if the plaintiff did have any case the same was barred by the statute of limitations. The court, thereupon, gave the following instruction: "Gentlemen of the jury, you are instructed that under the issues and proof in this case your verdict must be for the defendants." Plaintiff excepted; the jury returned a verdict for the defendants; the plaintiff filed his motion for a new trial, which was overruled, and he thereupon prosecuted error to this court.

But one question is presented by this record for our consideration, which is: did the court err in directing a verdict for the defendants? We shall not attempt to quote the evidence or any portion of it in this opinion. It is sufficient to say that there was evidence tending to establish the original employment of the plaintiff by both of the defendants. The fact that plaintiff rendered the services described in his petition is not disputed by the defendants, and there is no conflict of evidence on that question. To meet this proof, the defendant Edward Whitcomb, testified that the plaintiff volunteered to perform the services and agreed to charge nothing therefor.

While Hannah Whitcomb testified that at the time she talked with the plaintiff and placed the case in his hands, she said to him that she wanted it understood that no bill was to follow. This was denied absolutely and positively by the plaintiff. The evidence discloses that the plaintiff not only performed the services which the defendants both say were acceptable, and resulted in benefit to them, but it also appears that he procured and furnished transportation for the defendant, Edward Whitcomb, from

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Friend, Nebraska, to Geneva, Illinois, and return. So it may be fairly said that there was evidence, so far as the employment, the performance of the services, the value thereof and an implied promise to pay, were concerned, which should have been submitted to the jury.

It appears, however, that the last item of service was performed more than four years before the date of the commencement of this action. The evidence discloses that at that time the estate was not finally or fully settled, and that the plaintiff was not discharged from his employment, and there is no evidence which shows when the employment terminated. The plaintiff testified that he subscribed for the defendants' newspaper, which was published at their home in Friend, Nebraska; that the subscription price was \$1 per year; that they sent the paper to him and he received it for the years 1893 to 1900 inclusive; and that he credited the defendants' account with the said several sums, amounting in all to \$8. The defendant Edward Whitcomb, in order to avoid the effect of this evidence, testified that he sent the paper to the plaintiff gratuitously; that he never charged or intended to charge the plaintiff anything therefor. Upon this evidence the court directed the jury to return a verdict for the defendants as above stated. We suppose this instruction was given on the theory that there was no evidence which would operate to take plaintiff's claim out of the statute of limitations.

The real question for us to determine is, whether or not there was any conflict in the evidence which would require the court to submit the questions of fact to the jury.

In the leading case of *Catling v. Skoulding*, 6 Term Rep. [Eng.], 189, on this subject, Lord Chief Justice Kenyon said: "I take it to have been clearly settled, as long as I have any memory of the practice of the courts, that every new item and credit in an account given by one party to the other is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained."

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In *Gunn v. Gunn*, 74 Ga., 555, the court said: "Such a state of facts implies that the parties have mutually consented that each item, in whosoever favor it may be, shall not constitute an independent debt due immediately, to be paid or enforced at once, but that the items occurring, from time to time, in favor of the respective parties shall operate as mutual set-offs, and that the shifting balance, when either or both shall call for it, shall be the debt. This is the reason why the statute of limitations does not apply during such a state of mutual dealings." *Abbott v. Keith*, 11 Vt., 525.

In *Chapman v. Goodrich*, 55 Vt., 354, it was held, that a defendant can not omit certain items and so plead the statute of limitations. A physician's bill contained twenty items running from December, 1877, to February, 1878, of which nine were barred by time, a credit of \$6 in February, 1878, was held to take all the items out of the statute and render the whole account open and mutual. *Hollywood v. Reed*, 55 Mich., 308.

In *Woolley v. Osborne*, 39 N. J. Eq., 54-59, J. entered charges against D., and also entered credits of rent due to him from D. It was held that such charges and credits of rent offsetting them constituted a mutual account.

The doctrine of mutual accounts rests not on the notion that every credit in favor of one is an admission by him of indebtedness to the other or a new promise to pay, but upon a mutual understanding, either express or implied from the conduct of both parties, that they will continue to credit each other until at least one desires to terminate the course of confidential dealing and that the balance will then be ascertained, become then due and be paid by the one finally indebted. As this state of things rests on an express or implied mutual understanding either party may terminate it at any time by an actual payment of the balance, or by stating the account for that purpose, or by demanding a settlement privately, or by suit, or by an act which plainly shows to the other his determination to deal no longer that way. Without proof of its termina-

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tion the law presumes that such a mutual understanding, once proved or admitted, runs through all the dealings of the parties until the complete bar of the statute has attached. *Gunn v. Gunn, supra*. The statute does not begin to run against a claim based upon the services of an attorney in conducting a suit, until the date of the completion of the services. Buswell, Limitations and Adverse Possession, section 194, and cases cited.

From a careful review of the authorities and an examination of the evidence as preserved in the bill of exceptions, we are satisfied that the court erred in directing a verdict in this case. The questions of fact should have been submitted to the jury under proper instructions. It was for that body to determine whether or not from all of the facts and circumstances disclosed by the evidence the defendants sent their newspaper to the plaintiff gratuitously, and that they never made any charge and never intended to make any charge therefor. If the jury had believed the evidence of the plaintiff on this question, disbelieved the evidence of the defendants and had concluded that the defendants claimed that the newspaper was sent gratuitously, for the sole purpose of avoiding the question of mutual accounts and to establish the defense of the statute of limitations, then their verdict would have been for the plaintiff for whatever amount the testimony showed the services were reasonably worth less the sum so created on account of the newspaper. Wherever there is a conflict of evidence upon any material issue involved in the trial of a law suit, it is the duty of the court to submit such question to the jury. The weight of evidence is not a question for the court in such a case.

We therefore hold that the court erred in directing a verdict for the defendants, and we recommend that the judgment of the district court be reversed and the cause remanded for a new trial.

POUND and OLDHAM, CC., concur.

REVERSED AND REMANDED.

Gretch v. Maxfield.

GUSTAVE GRETCH V. JAMES K. MAXFIELD.

FILED FEBRUARY 17, 1903. No. 12,607.

Commissioner's opinion. Department No. 3.

1. **Appeal and Error: JURISDICTION: AFFIDAVITS PRESERVED IN BILL OF EXCEPTIONS.** Affidavits filed in support of objections to jurisdiction over the person, to be available in proceedings in error, must be preserved by bill of exceptions.
2. **Appearance: JURISDICTION: OBJECTIONS SPECIFIC.** A person appearing specially, for the purpose of making such objections, must point out specifically the defects upon which he relies. Following *Brown v. Goodyear*, 29 Neb., 376.

ERROR from the district court for Saline county. Tried below before STUBBS, J. *Reversed.*

Abbott & Abbott, for plaintiff in error.

J. D. Pope, contra.

ALBERT, C.

This action originated before a justice of the peace. The record of the justice shows that summons issued for the defendant on the 3d day of July, 1901, returnable on the 9th day of the same month, and its delivery to the attorney of the plaintiff. The docket entries thereafter, so far as material, are as follows:

"July 9, 1901, summons returned and filed indorsed as follows: Received this 1901, as commanded by this writ I on the 3d day of July, 1901, summoned the within named James K. Maxfield by delivering to him a certified copy of this summons with the indorsements thereon.

"Dated this 9th day of July, 1901.

"R. M. Earp, Constable.

"D. B. Zook, Justice of the Peace.

"July 9, 1901, 1 o'clock P. M.

"Parties appeared. J. D. Pope attorney for the de-

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defendant filed objections to the jurisdiction of the court as follows:

"State of Nebraska—Saline County, ss.

"Page 4.

"In Justice Court of D. B. Zook, thereof.

"Gustave Gretch, plaintiff,

"v.

"James K. Maxfield, defendant.

"And now comes James K. Maxfield by his attorney J. D. Pope, and appearing specially for the purpose of objecting to the jurisdiction of the court over the aforesaid defendant moves the court to quash the summons issued thereon for the following reasons:

"1. The court is without jurisdiction to hear and determine the said cause.

"2. No service of summons was made on the aforesaid defendant by a copy served upon him or left at his usual place of residence as required by the statute of the state of Nebraska.

"J. D. Pope, Attorney for defendant."

"The court overruled the motion and J. D. Pope, attorney for defendant, took exceptions to the ruling and then withdrew and would not take any further part in the cause. Plaintiff submitted the cause to the court.

* * * Gustave Gretch, R. M. Earp, Ola Bankson, James Osborne, Arthur Gretch, J. J. Deasky, L. Keahlier were sworn for plaintiff. Whereupon I find in favor of the plaintiff in the sum of \$47.18.

"It is therefore considered by me that the plaintiff recover from the defendant the sum of \$47.18 and his costs herein expended taxed at \$23.10."

From the judgment of the justice of the peace, the defendant prosecuted error to the district court where the judgment of the justice was reversed and the cause dismissed. From the judgment of the district court, the plaintiff prosecutes error to this court.

The principal contention of the defendant is that the copy of the summons, issued by the justice which was de-

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livered to him, bore no indorsement of the amount for which the plaintiff would take judgment in case the defendant failed to appear. Neither the original summons nor the copy is a part of the record in this case. It is true the transcript of the justice contains an affidavit to which is attached what purports to be a copy of the summons served on the defendant, but neither the affidavit nor the copy of summons is preserved by bill of exceptions. It has been repeatedly held by this court that affidavits, to be available for the purpose of review by proceedings in error or appeal, must be embodied in the bill of exceptions. *Willits & Co. v. Arena Fruit Co.*, 58 Neb., 659. We are aware of a *dictum* in *Republican Valley R. Co. v. Boyse*, 14 Neb., 130, to the effect that, where affidavits are attached to and made a part of a motion which is properly a part of a record, such affidavits thereby become a part of the record and their incorporation into a bill of exceptions is unnecessary. A *dictum* to the contrary may be found in *Tessier v. Crowley*, 16 Neb., 369. In *Vallindingham v. Scott*, 30 Neb., 187, this court refused to consider affidavits attached to a motion for new trial as exhibits. Hence, it would appear that the *dictum* in *Republicen V. R. Co. v. Boyse*, *supra*, has been repudiated. Besides, the affidavit in this case does not appear to have been made a part of the objections either by physical attachment or verbal reference, and we know of no authority that would warrant its consideration as part of the record under such circumstances.

The defendant contends that the judgment of the district court, reversing that of the justice of the peace, should, in any event, be sustained for the reasons (1), that the record does not show to what officer the summons issued, or that it was served within the jurisdiction of the justice, and (2), that the constable failed to note on the summons the date he received it. These objections are technical at best. To merit consideration, they should have been specifically pointed out in the objections filed before the justice of the peace. Not having been thus

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pointed out, they will not be examined in this court. *Brown v. Goodyear*, 29 Neb., 376; *Freeman v. Burks*, 16 Neb., 328. We do not wish to be understood to hold that they would have been good had they been thus pointed out.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

AMES and DUFFIE, CC., concur.

REVERSED AND REMANDED.

HENRY L. McELDON, REVIVED IN THE NAME OF BYRON McELDON, SOLE HEIR, v. MILO LEVI PATTON.

FILED FEBRUARY 17, 1903. No. 12,610.

Commissioner's opinion. Department No. 2.

1. **Tender: REQUISITES.** A tender, to be effectual, must be without conditions and made to the party entitled to receive the same.
2. **Tender: PAYMENT INTO COURT: COSTS MUST BE INCLUDED.** The plaintiff in an action already commenced is not compelled to receive a sum of money paid into court in satisfaction of his claim, unless the sum so paid is sufficient to include the costs to the time of payment.
3. **Tender: ACCEPTANCE CONSTRUED: COSTS.** The written acceptance in this case examined, and *held* to relate only to the amount of plaintiff's claim, and was not sufficient to include and require the payment of costs on his part.
4. **Trial: INSTRUCTION ASSUMING EXISTENCE OF FACT.** The giving of an instruction which assumes the possible existence of a fact, or state of facts, which the jury have no right to find, there being no evidence in support of it, is error.
5. **Trial: VERDICT CONTAINING SURPLUS WORDS: COSTS.** The trial court has no right to refuse to receive a verdict which responds to the issues and is sustained by sufficient evidence because it contains the words "and plaintiff to pay all costs." The question of costs is one of law for the court, and such words are merely surplusage.
6. **Trial: VERDICT REJECTED: INSTRUCTION AS TO FINDING AND COSTS.** After refusing to receive such a verdict it is error for the court,

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over the objections of the plaintiff, to instruct the jury that under the deposit made in the court, if they should find a verdict for the defendant, its effect would be that the plaintiff would receive the money in the hands of the clerk of the court and the plaintiff would pay the costs of the action.

7. Trial: EVIDENCE: VERDICT FOR PLAINTIFF: COSTS TAXED TO DEFENDANT: Under the undisputed evidence in this case *held*, that the plaintiff was entitled to recover the sum of \$30 with legal interest to the date of judgment, and the costs should have been taxed to the defendant.

ERROR from the district court for Otoe county. Tried below before JESSEN, J. *Reversed with directions.*

Edwin F. Warren and Logan & Jackson, for plaintiff in error.

No unconditional tender of any sum was made. A tender, to be effectual, must be unconditional and without qualification. *Tompkins v. Batic*, 11 Neb., 147; *Te Poel v. Shutt*, 57 Neb., 592; *Wood v. Hitchcock*, 20 Wend. [N. Y.], 47; *Noyes v. Wycoff*, 21 N. E. Rep. [N. Y.], 158; *Beckman v. Birchard, Bridge & Co.*, 48 Neb., 805; *Pulsifer v. Shepard*, 36 Ill., 513; *Clark v. The Mayor, Etc., of New York*, 1 Keys [N. Y.], 9; *Burt v. Dodge*, 13 Ohio, 131.

The jury has nothing to do with the question of costs, which is entirely a matter for the court. *Elsanger v. Grovjohn*, 29 Neb., at page 141.

D. W. Livingston and W. F. Moran, contra.

The acceptance of the tender was a waiver of any conditions. *Treat v. Price*, 47 Neb., 875.

BARNES, C.

This case is before us on a petition in error from a judgment of the district court of Otoe county. It appears that on or about the 27th day of March, 1900, the defendant Milo L. Patton, purchased of the plaintiff Henry L. McEldon, at public sale, one cow of the value of \$24 and one hog of the value of \$6; that at the same sale he also

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bid off or purchased of the plaintiff, one horse for \$6.50; that the defendant obtained possession of the cow and hog, but failed to get possession of the horse; that some days thereafter he went to the premises of the plaintiff and tendered him the sum of \$36.50, and demanded possession of the horse. The plaintiff refused to receive the money and deliver the horse. Defendant, at another time, made the same tender based upon the same conditions, and there is no conflict in the evidence upon this question. It is shown beyond dispute that the tender was the sum of \$36.50, and was conditioned upon the delivery of the horse. Matters remained in this situation for some time, when the plaintiff commenced an action in the county court against the defendant to recover the sum of \$30, and interest, which he claimed to be due him on account of the sale and delivery of the cow and hog. After the action was commenced the defendant deposited with the county judge the sum of \$30 to keep his alleged tender good. The plaintiff, thereupon, executed the following acceptance:

"Now comes the said plaintiff and accepts the tender of the said sum of \$30 paid into court by said defendant in discharge of plaintiff's claim, hereby waiving any interest thereon, and plaintiff further demands possession of and payment to him of said sum of \$30 so as aforesaid tendered and paid into court for his use in this action."

The \$30 were not paid over to the plaintiff upon said acceptance and demand therefor, and the cause proceeded to trial; judgment was rendered in favor of the defendant, and thereupon plaintiff appealed to the district court, and in his petition alleged that the defendant was indebted to him in the sum of \$30, and interest thereon from the 27th day of March, 1900; that said amount was due to him for the price and value of certain stock purchased by the said defendant of and from the plaintiff at a public sale held by plaintiff on said date, to wit: one cow of the value of \$24 and one hog of the value of \$6; that the defendant promised and agreed to pay said amount for said stock,

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but that he neglected and refused to pay the same, and that the whole sum thereof, \$30 and interest, was due and owing to the plaintiff from the defendant.

The answer of the defendant was in substance as follows: First, that the defendant, and one Alvin Patton who was his brother, had been, and were at the times mentioned in plaintiff's petition, partners and engaged in the business of farming and stock raising, etc.; that the defendant was an equal partner with his said brother in the firm of Patton Bros., and had an undivided one-half interest in the partnership property thereof; all of which was well known to the plaintiff at and prior to the dates mentioned in his petition; that on or about the 27th day of March, 1900, the defendant and said Alvin Patton as the firm or partnership of Patton Bros., purchased from the plaintiff, at public auction sale, the following property, to wit: one horse for the sum of \$6.50; one cow for the sum of \$24, and one hog for the sum of \$6; that thereupon, the defendant, as a member of said firm, offered the plaintiff the sum of \$6.50 in payment for said horse, the sum of \$24 in payment for said cow, and the sum of \$6 in payment for said hog; that said plaintiff took said money, and all of it in his hand, and shortly afterwards returned it to the defendant and refused to accept and retain it, and so informed the defendant, giving no reason for his refusal; that said hog and cow were delivered to the defendant, and plaintiff refused to deliver the horse and never has delivered said horse, although repeatedly requested so to do by the defendant and said Alvin Patton; that on or about the 31st day of March, 1900, the defendant, and the said Alvin Patton, went to the residence of the plaintiff for the purpose of offering to pay the plaintiff the sum of \$6.50 for the said horse, the sum of \$6 for said hog, and the sum of \$24 for said cow, at the same time having said sums of money in his possession, and exhibited the same to the plaintiff and offered it to him, whereupon the plaintiff refused it and all of it, and became enraged and refused to converse with either the defendant or his brother,

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the said Alvin Patton, and ordered each of them off his premises; that he advanced towards them with an axe in his hands in a menacing manner, using violent and profane language and threatening them with personal violence and great bodily harm, and forced them to leave said premises without carrying out their intention and making a complete tender of the several sums of money due from them to the plaintiff for the several articles of personal property so sold to them by the plaintiff; that ever since said time defendant has always been ready, able and willing to pay plaintiff \$6.50 for said horse, \$24 for said cow, and \$6 for said hog, and now tenders into this court the sum of \$6 for said hog, the sum of \$24 for said cow, making a total of \$30 for the said plaintiff, as he did in the lower court. The answer also further contained an allegation of the acceptance of the \$30 so paid into the lower court, and a copy of the plaintiff's acceptance hereinbefore set forth.

The plaintiff for reply to said answer denied each and every allegation of new matter therein contained, and alleged that he accepted the tender of the defendant provided the sum included the costs of the suit to the date of tender, which was refused by the defendant, and said tender of \$30 did not include the costs of said suit to the date thereof, and plaintiff averred that he was now ready to accept said tender of \$30 provided the defendant would pay the costs made in said action.

On these issues the cause was tried, and after the introduction of the evidence and the instructions of the court, the jury returned the following verdict:

"We, the jury in this case, being duly impaneled and sworn and affirmed, do find and say for the plaintiff the sum of \$30 without interest, and that plaintiff pay the costs."

This verdict the court refused to receive, and without the consent, and over the objection of the plaintiff, on his own motion, gave the jury the following additional instruction:

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"You are instructed that under the deposit made in this court if you find a verdict for the defendant the effect of it will be that plaintiff will receive the \$30 now in the hands of the clerk of this court, and the plaintiff will pay the costs of this action."

Thereupon the jury again retired, and after further deliberation returned the following verdict:

"We, the jury in this case, being duly impaneled and sworn, do find and say that we find for the defendant."

Thereupon the court rendered judgment on the verdict as follows:

"It is ordered and adjudged by the court that the plaintiff have and recover from the defendant the sum of \$30 without interest, and that the plaintiff pay all the costs of this action."

From that judgment the plaintiff prosecuted error to this court, and alleges:

1. That the court erred in giving instruction No. 5 to the jury. By this instruction the jury were told that the burden of proof was on the defendant to show by a preponderance of evidence that he had made an unconditional tender of all the money owing by him to the plaintiff, or that plaintiff had waived some part due him after this action was begun. And they were further instructed therein as follows:

"If you find from the evidence that the defendant has made an unconditional tender of all money due from him to the plaintiff before this action was begun, or that plaintiff has waived the repayment of costs expended by him, you will find for the defendant, and the \$30 now in court will be turned over to the plaintiff."

It is claimed by the plaintiff that this instruction should not have been given because there was no evidence of any unconditional tender by the defendant of the money due to him, and therefore that question should not have been submitted to the jury.

We have searched this record in vain to find any evidence of an unconditional tender. The evidence of the

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defendant and his brother shows that the only tender ever made, or attempted to be made, was the sum of \$36.50, which was coupled with a demand for the possession of the horse which the defendant had bid off at the sale, and which the plaintiff had refused to deliver to him. The vice of this instruction is that it assumes the possible existence of a tender before the commencement of this case in the county court. The jury would have no right to find that such a tender had been made, because there was no evidence to support such finding. It has often been held that if an instruction assumes the possible existence of a state of facts which the jury have no right to find, there being no evidence in support of it, it is error. *The City of Crete v. Childs*, 11 Neb., 252, 9 N. W. Rep., 55; *Dunbier v. Day*, 12 Neb., 596, 41 Am. Rep., at page 776, 12 N. W. Rep., 109; *Bowie v. Spaid*, 26 Neb., 635, 42 N. W. Rep., 700; *Farmers' Loan & Trust Co. v. Montgomery*, 30 Neb., at page 41, 46 N. W. Rep., 214. There being no evidence of an unconditional tender before the commencement of the suit, this question should not have been submitted to the jury, and the court erred in giving the instruction complained of.

2. It is further contended by the plaintiff that the court erred in giving instruction No. 6½ to the jury, which is as follows:

"The jury are instructed that if you find from the evidence that the plaintiff at any time accepted unconditionally the tender of money offered him by the defendant, or by any one authorized by the defendant so to tender it, your verdict should be for the defendant."

Plaintiff insists that the written acceptance made by him and filed in the county court after the defendant had deposited the sum of \$30 therein, was not sufficient to authorize the giving of this instruction; that such acceptance clearly stated and unequivocally implied that it was on condition that the defendant pay the costs which had accrued up to that time.

It will be observed that it was stated in the written ac-

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ceptance that the \$30 were accepted in payment of plaintiff's claim, and that interest thereon was waived. Its effect, therefore, was to exclude the idea that the acceptance was to include costs. Applying the rule "That the express mention of one thing causes the exclusion of another" we think the plaintiff is right in this contention. It follows that there was no evidence upon which the instruction could be based, and the court erred in giving it.

3. The plaintiff further contends that the court erred in refusing to receive the first verdict returned by the jury. We are unable to determine on what theory the court refused to receive this verdict. It responded to the issues and was sustained by sufficient evidence. It was correct in form and substance, with perhaps the single exception of the words "and that plaintiff pay the costs." This should have been treated as surplusage; the court should have received the verdict, entered a judgment thereon for the plaintiff and determined the question of taxation of costs as a matter of law. The jury had nothing whatever to do with the question of costs, and therefore that part of the verdict was merely surplusage. *Elsanger v. Grovjohn*, 29 Neb., at page 141. In that case, speaking of the question of costs, the court said: "There was no impropriety in permitting the amendment to be made after the verdict was returned. The offer to allow judgment could only affect the matter of costs. The jury had nothing to do with that question. It was a question solely for the court, and the offer could be brought to the attention of the court after verdict. In fact, that was the proper time to do so." For these reasons the court erred in refusing to accept the verdict.

4. The plaintiff also contends that the court erred in giving the additional instruction to the jury over his objection. By this instruction the court told the jury that under the deposit made in the court if they found a verdict for the defendant the effect of it would be that the plaintiff would receive the \$30 in the hands of the clerk of the court, and plaintiff would pay the costs of the action.

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This instruction evidently was given to inform the jury that if they thought the plaintiff should pay all of the costs in the action that their verdict, in order to accomplish that result, should be for the defendant.

As we have stated, the question of the costs was one that the jury had no right to consider; it was a matter of law for the court, and the court had no right or authority to place that burden upon the jury, or permit it to pass on that question in any form, and we hold that the giving of the instruction was reversible error.

It is evident that the court knew and understood his duty in this case, because we find that after the second verdict was returned in which the jury found for the defendant, the court on his own motion rendered a judgment on that verdict for the plaintiff for the sum of \$30 without interest, and taxed all of the costs in the case to the plaintiff. If the second verdict was a proper one then we have a verdict of the jury for the defendant and a judgment of the court thereon for the plaintiff. We certainly ought not to be asked to approve of this sort of a proceeding. At the time the defendant paid the \$30 into the county court the plaintiff had incurred a liability for costs to the amount of \$3.10. He had a right to demand and receive that sum in addition to the \$30 admitted to be due to him, and his refusal to accept the sum paid and pay the costs himself did not make him liable for the costs thereafter incurred, and yet the court taxed all of the costs to him.

After a careful examination of the record and bill of exceptions herein we are unable to say that there was any evidence in this case which would authorize the court to tax the costs of this action to the plaintiff. Notwithstanding the court erred as above set forth, yet in rendering judgment he came very near correcting his former errors. The judgment was rendered for the plaintiff, but it should have included interest to the date thereof, and his costs.

We therefore recommend that the judgment of the district court be reversed and the cause remanded to said

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court with directions to render a judgment in accordance with this opinion.

POUND and OLDHAM, CC., concur.

The judgment of the district court is reversed and the cause remanded with directions to said court to render a judgment for the plaintiff for the sum of \$30 with legal interest to the date thereof, and tax the costs expended by him to the defendant.

REVERSED WITH DIRECTIONS.

H. F. CADY LUMBER COMPANY, APPELLEE, V. GREATER AMERICA EXPOSITION ET AL., APPELLEES, IMPLEADED WITH THE CHICAGO HOUSE-WRECKING COMPANY, APPELLANT.

FILED FEBRUARY 17, 1903. Nos. 12,622, 12,624, 12,626, 12,627, 12,628, 12,629.

Commissioner's opinion. Department No. 1.

1. **Mechanics' Liens: CONSTRUCTION OF STATUTES: "APPURTENANCE."**
The word "appurtenance" as used in section 1, article 1 of chapter 54 of the Compiled Statutes [Annotated Statutes, section 7100], means appurtenance to the land and not to some other structure.
2. **Mechanics' Liens: APPLICATION OF STATUTES: "APPURTENANCE."**
An amphitheatre and framework built on posts firmly imbedded in the soil constitutes an "appurtenance" within the meaning of said section and is subject to a mechanic's lien.
3. **Payment: BILLS AND NOTES: TAKEN "IN PAYMENT ON ACCOUNT": CONSTRUCTION: MECHANICS' LIENS.** The fact that the cashier of a corporate creditor signs a receipt which the debtor has already prepared, reciting that a certain note is taken "in payment on account" and that the amount of said note is credited on the corporate books, are not conclusive evidence that the account is paid, and a finding whereby the note is treated merely as evidence of payment will not be disturbed where testimony and other circumstances appear to support it.

APPEAL from the district court for Douglas county.
Tried below before DICKINSON, J. *Affirmed.*

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Woolworth & McHugh and *T. J. Mahoney*, for appellant.

Kennedy & Learned, for appellee, H. F. Cady Lumber Company.

W. H. De France, for appellee, Morton & Son.

T. J. Mahoney, for Richard S. Horton, trustee and intervener.

LOBINGIER, C.

These are suits to enforce liens for materials used in the erection of a structure known as the Fire Works Amphitheatre and Frame Work on the grounds of the Greater America Exposition at Omaha. The facts are in part similar to those in *Zabriskie v. Greater America Exposition*, — Neb., —, 93 N. W. Rep., 958, just decided, and the conclusions there reached are applicable so far as they go. But we have here some additional questions, one of which is whether the structure referred to is included in any of those mentioned in section 1, article 1, chapter 54, Compiled Statutes [Annotated Statutes, section 7100], which provides for a lien on a "house, mill, manufactory or building or appurtenance." The structure in question consisted of an amphitheatre for the seating of spectators but open to the sky, and a framework for the display of fireworks. The former is more particularly described in the examination of one of the witnesses, as follows:

Q. Do you know the character and construction of the fireworks amphitheatre and grand stand?

A. Yes, sir, I do.

Q. Will you state to the court how it is constructed particularly as to its attachment to the ground?

A. In nearly every case there has been a hole dug and an upright has been set and each upright was set firmly in the ground, sometimes it was set on a block and other times it was not, but it was attached as firmly to the ground

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as any other exposition structure there in proportion to the size of the structure, you might say there were two or three hundred uprights, each one sunk into the ground and attached there firmly.

Q. State whether or not it was a solid, substantial structure?

A. Well, it was a solid structure, otherwise they could not put thousands of people on there; it was firmly attached, no wind could have blown it away, it was not on the top of the ground by any means.

Another witness thus describes the remaining part of the structure:

Q. I want to know whether there was any structure known as the fireworks as distinguished from this amphitheatre?

A. There was what you would call a framework for the fireworks.

Q. Was that across the lake from the amphitheatre?

A. Yes, but that was a part of it, that was all included in this section.

Q. It was included in what you term the fireworks?

A. Yes, sir.

Q. What was the structure across the lake?

A. That was called the framework for the fireworks, that is technically.

Q. How was it built up?

A. The posts were sunk into the ground in a very firm manner so as to make them stand up without any brace whatever; they stood just the way they were put into the ground, the depth they were put in the ground and then poles went up thirty feet high so they were pretty well put in the ground.

Q. I want to know about the structure, did that have a roof?

A. No, sir, it was framework.

Q. What was the general aspect of it, what was the shape of it?

A. I could not describe it to you any better than to say

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it was a continuous frame work may be about 300 feet long and the high poles on the building on the further side and then came a row of lower poles, and then another row of lower poles.

Q. Was it one long row of poles and lumber in the nature of a fence?

A. No, sir, it was open frame work, no one could pass over it, and each and every pole was joined to another pole.

Q. In what way?

A. By 2x6s and 2x10s; it depended upon how heavy the pieces were that were going to be exhibited. Of course they had to change the pieces from time to time depending on how heavy a piece they were going to exhibit.

Q. The frame work was for the purpose of placing the display of the fireworks?

A. Yes, sir.

It is clear that this structure would not be included within the first three enumerated in the statute. If it is subject to a lien it must be because it constitutes a "building" or an "appurtenance." Appellants contend that the latter of these words means an appurtenance to one of the others—in other words, that the statute affords a lien upon no structure which is not included in the first four named or is an appurtenance to a structure so included. We are cited to *Canisius v. Merrill*, 65 Ill., 67, but the statute there construed reads, "building, or the appurtenances of any building." The Kansas statute likewise employs the phrase "appurtenances of any building." *Hathaway v. Davis & Rankin*, 32 Kan., at page 695. The statutes construed in *Thompson v. Smith*, 67 N. H., 409, and *McDonald v. Minneapolis Lumber Co.*, 28 Minn., 262, are more like our own, and each of these reads "house, mill, manufactory, or other building or appurtenances." Here not only is the word used in the plural, but it is set off from the remaining designations by the word "other" and used in connection with building alone.

But whatever may have been the construction of other statutes, we feel bound by a prior decision of this court to

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hold that the word "appurtenance" in our statute means an appurtenance to the ground and not merely an appurtenance to some other building. In *Phelps & Bigelow Windmill Co. v. Shay*, 32 Neb., 23, where a lien was sought to be foreclosed against a windmill, it was observed:

"The windmill in this case evidently comes under the head of 'appurtenance,' and the party is entitled, where the proper steps have been taken, to a mechanic's lien."

We do not think that a windmill can be construed as appurtenant to another building any more than the structure here in controversy. It does not even appear from the case cited that the windmill was near any other structure. For aught that appears it may have been placed, as is often done, in a pasture remote from other buildings. The doctrine that a lien attaches to a windmill was also held in *United States Investment Co. v. The Phelps & Bigelow Windmill Co.*, 54 Kan., 144. Moreover it seems to us that this is the logical construction of the statute. It would hardly be possible to enumerate specifically in the act, all the structures to which it was intended that a mechanic's lien should attach. We think that what the framers of the statute have attempted to do is to specify the most common structures and to include all the others in the generic term "appurtenance," and that this was intended to cover structures like that in controversy which are attached to the land.

2. In the course of its dealings with the Greater America Exposition company, appellee received the latter's note for \$3,000. This note was given at a time when appellee was pressing for a payment on its claim, and the auditor of the exposition company in a conversation with appellee's treasurer inquired if appellee could not use a note. It was finally agreed that a note should be given and appellee's cashier was sent to obtain it. The note was delivered to him and at the same time he signed the following receipt which had been written out for him by the auditor of the exposition company:

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"August 24th, 1899.

"Received from the Greater America Exposition, note No. 18 for Three Thousand Dollars, (\$3,000) in payment on account.

"Signature H. F. Cady Lumber Co.

"Address E. D. Evans, Cash."

This note was afterward sold to or placed in the bank and a payment of \$500 made which was credited thereon. The balance does not appear to have been paid. Appellee's ledger was also introduced showing a credit of \$3,000 when the note was received. It is earnestly contended that these facts are conclusive evidence that the note was accepted in absolute payment *pro tanto* of the account and that at least the amount of the lien must be reduced accordingly. The cashier who signed the receipt testifies that nothing was said to him about accepting the note in payment. Indeed, it is not claimed that there were any negotiations to that effect with any of appellee's agents. Its treasurer testifies, though over objection, that "we just received it as evidence of the account," and that it was not the intention in entering the note upon the books to give an absolute credit of the amount thereof. It also appears that he consulted appellee's attorneys as to whether the acceptance of the note would preclude the obtaining of a lien, and was informed that it would not.

On this evidence the court found for appellee, and we do not think that we should disturb its finding. The question is one of fact to be determined from all the circumstances of the case. *Young v. Hibbs*, 5 Neb., at page 437; *Harvey v. First National Bank of Omaha*, 56 Neb., at page 332. But as an original question we do not think we should have found differently. It is inconceivable to us that any prudent business man would knowingly and intentionally have accepted as full and absolute payment of so large an item, the mere unsecured note of a concern without available assets and scarcely able at the time to meet its current expenses. We can not but think that both the signing of the receipt and the crediting of the

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amount on the books were inadvertences on the part of the employees to whom appellee was necessarily compelled to entrust the details of its business. To deny appellee a lien solely on this ground would, it seems to us, be clearly inequitable and would be placing the form above the substance. As a legal proposition neither the entry of credit nor the giving of the receipt were conclusive. In *Brigham v. Lally*, 130 Mass., 485, the trial court was asked to rule "that the taking of the note, it being a negotiable note, and placing it to the credit of the defendant in the journal and ledger, and making no other application of the note, is in law payment." The refusal of this request was upheld on appeal. So the giving of this receipt even though purporting to be in payment was not conclusive. As was said in *Berry v. Griffin*, 10 Md., at page 31:

"If any legal principle can be well settled by repeated uniform decisions, the cases which have been referred to must be sufficient to show that where an account is due and the creditor receives from his debtor a promissory note 'in payment of the account,' giving a receipt in those terms, the note is not a satisfaction or extinguishment of the original claim, unless there be evidence, in addition to the receipt, for the purpose of proving an agreement that the creditor was to receive the note as payment and to run the risk of its being paid."

In *Howard v. Jones*, 33 Mo., at page 587, it was observed: "The note, instead of being evidence of payment of the debt, was only evidence of its continuance, and there was no evidence of its acceptance as payment other than the receipt given in evidence." The same doctrine in cases not materially different from that at bar is announced in *Johnson v. Weed*, 9 Johns. [N. Y.], 310; *Muldon v. Whitlock*, 1 Cow. [N. Y.], 290; *Glenn v. Smith*, 2 G. & J. [Md.], 493; *Feamster v. Withrow*, 12 W. Va., 611; *In re Hurst*, 1 Flippin [U. S. C. C.], 462. The giving of such a receipt as this may always be explained and off-set by other evidence. *Swain v. Frazier*, 35 N. J. Eq., 326. Indeed, if this receipt failed to express the true intent of the parties, the

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court below being a court of equity, had power to reform it or treat it as reformed. Moreover, it may well be questioned whether an employee, like this cashier who is not shown to have been an officer or even a stockholder in the corporation, had power to bind appellee by such a receipt. As it turned out, the transaction would have amounted to a release of part of the indebtedness, and not even the president of a corporation has implied power to effect this. *Olney v. Chadsey*, 7 R. I., 224; *Hodge's Executors v. First National Bank*, 22 Grat. [Va.], 51; *Brouwer v. Appleby*, 1 Sandf. [N. Y.], 158.

We recommend that the decree be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

OMAHA OIL & PAINT COMPANY, APPELLEE, v. THE GREATER AMERICA EXPOSITION ET AL., APPELLEES, IMPLEADED WITH THE CHICAGO HOUSE WRECKING COMPANY, APPELLANT.

FILED FEBRUARY 17, 1903. No. 12,623.

Commissioner's opinion. Department No. 1.

1. **Mechanics' Liens:** ASSIGNMENT NOT ACCEPTED OR ACTED UPON: RIGHTS OF ASSIGNOR. The right to a mechanic's lien is not lost by the mere execution and delivery by the claimant of an order requesting the debtor to pay the amount of the claim to a third party where it is not shown that the latter has accepted it or acted thereon.
2. **Judgment:** CONFORMING TO INADMISSIBLE EVIDENCE: APPEAL AND ERROR. A decree will not be reversed because it fails to conform to evidence appearing in the record but not admissible under the pleadings.

APPEAL from the district court for Douglas county. Tried below before DICKINSON, J. *Affirmed.*

Woolworth & McHugh and *T. J. Mahoney*, for appellant.

Byron G. Burbank, contra.

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LOBINGIER, C.

This is a suit to foreclose a mechanics' lien for labor performed and materials furnished in painting the Greater America Exposition buildings. The first cause of action set forth in the petition relates to materials furnished directly by the plaintiff. The remaining causes of action arise out of claims for labor and materials performed and furnished by one J. F. Gabler who took the necessary steps to perfect his lien and from whom plaintiff claims as assignee. The court found that plaintiff was entitled to a lien for all these claims, and from a decree in accordance with this finding defendants appeal.

The painting material and labor supplied by appellee and its assignor were clearly such as would support a lien. *Wakefield v. Latey*, 39 Neb., 285; *Horton v. Thompson*, 3 Tenn. Ch., 575. But it is claimed that none attached because (1), the buildings were not of such a character as to be subject to a mechanic's lien, and (2), Gabler had assigned his claim to appellee before taking the steps to perfect his lien, which was therefore of no validity. The first of these points has already been settled adversely to this contention in *Zabriskie v. Greater America Exposition*, — Neb., —, 93 N. W. Rep., 958. The second is peculiar to this case, but it does not seem to have been raised by the pleadings. Neither in the answer of the principal defendant nor in the petition of the intervener is there any allegation that Gabler's claim was assigned to appellee prior to the perfection of the former's lien. Each of these pleadings indeed, contains a general denial of the matter alleged in the petition, and the exposition company's answer alleges that Gabler was not entitled to a lien because of the character of the buildings. But the affirmative defense of an assignment is nowhere specifically set forth and it may well be questioned whether evidence thereof is admissible under a general denial. 13 Ency. Pl. & Pr., 993, 995. Nevertheless, appellee's manager was permitted to testify

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on cross-examination that previous to the filing of the claim for a lien he prepared a written order to the exposition company requesting it to pay the balance due on Gabler's contract to the appellee and that this was signed by Gabler. No payment was made on this by the exposition company and there is no evidence that the order was ever presented by appellee or even that appellee accepted it. The rule laid down in several recent decisions is that the mere execution and delivery of such an order will not of itself divest the claimant of his right to perfect a lien. As was said in *Dowd v. Dowd*, 126 Mich., 649: "An instruction by the lienor to pay his wages to the principal defendant does not operate as a waiver of the lien, only so far as such instruction has been acted upon and the amount paid." See, also, *Palmer v. Uncas Mining Co.*, 70 Cal., 614; *Ittner v. Hughes*, 154 Mo., 55 (which may be taken as explaining *Rand v. Grubbs*, 26 Mo. App., 591).

We are cited to a number of cases where orders were accepted by the assignee and held to constitute equitable transfers of the fund in question. But we have been referred to no case holding that a lien would be lost by reason of the facts appearing in this record.

But even if the evidence were sufficient to show an absolute assignment of the claim and its acceptance thereof before the perfection of the lien, we would still not feel justified in disturbing the trial court's finding, because, as we have seen, it is at least doubtful if the question is properly raised under the pleadings. The fact that the court admitted irrelevant evidence would not have authorized it to base a decree thereon. *First National Bank of Plattsmouth v. Gibson*, 57 Neb., 246; *Union Stock-Yards Co. v. Goodwin*, 57 Neb., 138.

We recommend, therefore, that the decree be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

Chamberlain v. Chamberlain Banking House.

JOSEPH LEE CHAMBERLAIN V. CHAMBERLAIN BANKING
HOUSE.

FILED FEBRUARY 17, 1903. No. 12,633.

Commissioner's opinion. Department No. 2.

1. **Trial: INSPECTION OF BOOKS OR PAPERS: EVIDENCE: STATUTES: CONSTRUCTION.** Under section 394, Code of Civil Procedure, the granting of orders for inspection of books or papers is left to the discretion of the trial court, and it is also left to the discretion of the court whether or not to exclude such books or papers at the trial if inspection is not permitted.
2. **Trial: EVIDENCE INDIRECT: COMPETENCY.** Evidence is not to be rejected necessarily because it does not bear directly upon the issue; if it tends reasonably to establish the fact in controversy by strengthening the probabilities upon one side, and is otherwise competent, it should be received.
3. **Trusts: DEPOSIT IN BANK TO PRIVATE CREDIT: LIABILITY OF BANK: PLEADING: EVIDENCE.** A trust fund does not lose its character as such by being deposited by the trustee in a bank to his own credit; but to hold the bank therefor it must be pleaded and proved that the fund remains in the bank in some form.

ERROR from the district court for Johnson county. Tried below before LETTON, J. *Affirmed.*

Hugh La Master and *B. L. Aycock*, for plaintiff in error.

The nineteen hundred dollars of plaintiff went into the First National Bank of Albany to defendant's credit. It never ceased to be plaintiff's money. *Cady v. South Omaha Nat. Bank*, 46 Neb., 756, 49 Neb., 125, approved in *Alter v. Bank of Stockham*, 53 Neb., at page 235.

The knowledge of the officers that this was plaintiff's money was notice to the bank. Story, Agency [9th ed.], section 140b; 1 Parsons, Contracts [7th ed.], bottom page 83; *Harrington v. United States*, 11 Wall. [U. S.], 356 [20 Law Ed., 167].

The money was the property of the plaintiff and the bank took it impressed with that character. It is immaterial in whose name it appeared on the books of the bank.

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Central Nat. Bank v. Connecticut Mutual Life Ins. Co., 14 Otto [U. S.], 54 [26 Law Ed., 693]; *Van Alen v. The American Nat. Bank*, 52 N. Y., 1; *Cady v. South Omaha Nat. Bank*, 46 Neb., 756, 49 Neb., 125.

Under the allegations of the pleadings defendant should only have been permitted to prove that it never received the money. If it wished to prove any attempted "division" of the funds between the two officers it should have alleged its defenses in its answer. Section 99, Code of Civil Procedure; *Cady v. South Omaha Nat. Bank*, 46 Neb., at page 764.

M. B. C. True, contra.

POUND, C.

The plaintiff sues the defendant, an incorporated state bank, to recover a balance of a sum of money alleged to have been placed in the bank on general deposit. The answer of the bank is a general denial, and its case is that the money was deposited by the plaintiff with his cousins, Clarence K. Chamberlain and Charles M. Chamberlain, and that there never was any account between the plaintiff and the bank, nor did he ever have a deposit therein. Upon trial to a jury there was a verdict for the defendant and judgment accordingly.

The principal questions raised relate to the admission of books of the bank in evidence, and to the admission of evidence concerning the circumstances under which the money came to the plaintiff and the manner in which Clarence K. Chamberlain and Charles M. Chamberlain afterwards dealt with it. Plaintiff made a demand for inspection of the books of the bank and of letters and telegrams relating to the original deposit, under section 394, Code of Civil Procedure. On going to the bank, his attorney was informed that the books were in the vault for his inspection, and the vault was opened for him; but the bank officers refused to leave their work for the purpose of going through the books and searching for or pointing out

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particular entries. The trial court evidently thought that if plaintiff's attorney was unable to gather the information he desired from the books, without the assistance of some person who understood the banking business and was acquainted with the methods of keeping the books of a bank, he should have brought an expert with him who would be able to point out the entries and explain them, and that it was asking too much to expect the officers and employees of the bank to suspend their work and act in such capacity. Under section 394, Code of Civil Procedure, the granting of orders for inspection of books or papers is expressly left to the discretion of the trial court, and it is also left to the discretion of the court whether or not to exclude such books or papers at the trial if inspection is not permitted. We see no reason to think that the trial court abused its discretion in this case.

The money in controversy was received by plaintiff from the estate of a deceased aunt. The defendant was allowed to show that this aunt had made a will wherein certain bequests were made to plaintiff, but had left a subsequent will in which there were no such bequests; that Clarence K. Chamberlain suggested to the plaintiff the desirability of contesting the subsequent will; and that a contest was had, as a result of which, through compromise or settlement, plaintiff received the money in question. It was also permitted to show that the money, when received, was divided between Clarence K. Chamberlain and Charles M. Chamberlain, and that they personally kept an account with plaintiff and remitted various amounts to him from time to time on demand. We think this testimony was properly received. The issue was whether the money was deposited in the bank or with the plaintiff's cousins individually. Evidence is not to be rejected necessarily because it does not bear directly upon the issue; if it tends reasonably to establish the fact in controversy by strengthening the probabilities on one side, and is otherwise competent, it should be received. *Cortelyou, Ege & Vanzandt v. McCarthy*, 37 Neb., 742, 746; *Gandy v. The Estate of*

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Bissel, 3 Neb. [Unof.], 47, 90 N. W. Rep., 883. The evidence in question tended to show a probability that the money was left with those at whose suggestion the contest had been instituted and the proceedings carried on from which plaintiff derived the money, and the subsequent division of the fund between those persons indicates that it was so understood.

Complaint is made with reference to the refusal of the court to give an instruction based upon *Cady v. South Omaha National Bank*, 46 Neb., 756. We do not think that case has any application. A trust fund does not lose its character as such by being deposited by the trustee in a bank to his own credit; but to hold the bank therefor it must be pleaded and proved that the fund remains in the bank in some form. *City of Lincoln v. Morrison*, 64 Neb., 822, 90 N. W. Rep., 905. To hold the bank under the case of *Cady v. South Omaha National Bank*, *supra*, it would be necessary to show the condition of the personal accounts of Clarence K. Chamberlain and Charles M. Chamberlain with the defendant bank from the time they originally placed the fund in question to their individual credit in the bank. Presumably they drew out sums from time to time and made further deposits. It may well be that their accounts were overdrawn during the period intervening between the division and deposit of the fund and the bringing of this suit. It would take very different pleadings and much more complete proofs than are presented in the case at bar to justify a judgment against the bank on the ground that it holds a trust fund. Other instructions are objected to as assuming facts not shown in evidence; but we do not think the objections are well taken. The instructions are expressly conditioned upon the jury's finding that the facts set forth are true, and leave nothing for the jury to find which is not sustained by the evidence in the record.

We therefore recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

Keplinger v. Woolsey.

CATHERINE E. KEPLINGER, APPELLEE, v. CURRY B.
WOOLSEY, APPELLANT.

FILED FEBRUARY 17, 1903. No. 12,639.

Commissioner's opinion. Department No. 2.

1. **Equity: "ADEQUATE REMEDY AT LAW": INJUNCTION.** The term "adequate remedy at law" means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.
2. **Easements: PROTECTION OF INJUNCTION.** Injunction is a proper remedy to protect against an interference with the enjoyment of an easement.
3. **Easements: REMOVING OBSTRUCTIONS.** A party aggrieved may peacefully remove an obstruction from the enjoyment of an easement without committing an illegal act.
4. **Deeds: DESCRIPTION: EVIDENCE IN AID OF.** The description in a deed may be aided by extrinsic evidence.

APPEAL from the district court for Johnson county.
Tried below before LETTON, J. *Affirmed.*

L. C. Chapman and Ed. M. Tracy, for appellant.

Hugh La Master, contra.

OLDHAM, C.

At and prior to June 22, 1899, one C. C. Cook was the owner of lots 8 and 9, in block 36, in the city of Tecumseh, Nebraska. These lots lay adjacent to each other with nothing to mark the dividing line between them, and had but one well of water on the two lots. This well had been dug on lot 9, about ten or twelve feet east of the dividing line between the lots. On June 22, 1899, Cook conveyed lot 8 to one Charles A. Talcott by deed of general warranty containing the following condition: "It is agreed that said Charles A. Talcott may have the use of a certain well near the line between lots 8 and 9 in said block, and shall own one-half interest in said well." March 9, 1901,

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Talcott conveyed this lot by deed of warranty containing the same condition to Catherine E. Keplinger who was the plaintiff in the court below and is the appellee in this cause of action. On March 15, 1900, Cook conveyed lot 9 to Curry B. Woolsey (who was defendant in the court below and is the appellant in this cause of action) by deed of general warranty containing the following reservation: "Said Cook has heretofore given the owner of lot 8, block 36, the right to get water from the well on the premises herein conveyed, and said Woolsey buys subject to such agreement with the owner of lot 8."

Each of these adjacent lots contained a dwelling house which was occupied by the families of the contending parties. In April, 1901, the owners of the lots by mutual consent erected a line fence between the two lots. The fence was of woven wire and followed the dividing line between the lots to a point just west of the well curb where the fence was turned and run to each of the corners of the well curb, leaving a lane about four feet wide and ten to twelve feet long through which the owner of lot 8 could reach the well for the purpose of getting water. This passageway remained in this condition until July 3, when the owner of lot 9 tore one end of the wire fence loose from the well curb and extended it straight along the lot line, shutting off the owner of lot 8 from any means of reaching the well. On July 6 plaintiff in the court below removed the wire fence from the lane leading to the well and subsequently filed her petition in the district court asking for an injunction to restrain the defendant from interfering with her right of way to the well. On a trial had to the court on issues thus joined, plaintiff had judgment as prayed in her petition and defendant brings the case to this court on appeal.

It is urged in the brief of appellant that the plaintiff in the court below failed to show that she had no adequate remedy at law by neither alleging nor attempting to prove that the defendant was insolvent and that unless the defendant was insolvent she could have obtained full re-

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dress for her wrongs, if any, without invoking the aid of equity. While it is true that equity will not extend the strong arm of an injunction where a full, complete and perfect remedy can be found in the courts of law, still the term "adequate remedy at law" as we understand it means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Welton v. Dickson*, 38 Neb., 767, 57 N. W. Rep., 559; *Bankers Life Insurance Co. v. Robbins*, 53 Neb., 44, 73 N. W. Rep., 269. The question as to whether a legal remedy would be adequate or not depends in most cases on the facts involved in the controversy, and where the facts are of such a nature as to render the measure of damages speculative and impossible to ascertain with any degree of certainty, equitable relief is seldom denied and injunction is uniformly held to be a proper remedy to protect against an interference with the enjoyment of an easement. Beach, *Injunction*, section 1016; Washburn, *Easements and Servitudes* [4th ed.], section 747.

It is further urged by appellant that even if the plaintiff in the court below had originally been entitled to an injunction to restrain the interference with her passageway to the well, nevertheless, by committing an act of trespass in removing the wire fence from the passageway, her cause of action is made to rest on a violation of the law and consequently equity will not aid in the enforcement of any right which is founded upon a wrong.

Without discussing the necessity of removing the wire fence from across the passageway to the well as antecedent to the right to maintain an injunction restraining an interference with the easement, and without questioning the proposition that equity will deny relief to one seeking to found a right upon the commission of an illegal act, we will first consider the question as to whether plaintiff committed any wrong when she removed the obstruction from the passageway. The right of a party aggrieved to abate a nuisance or to remove an obstruction from a high-

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way or even to enter on another's land and peacefully remove a wall or other obstruction to an ancient light is a fundamental doctrine fully explained in 3 Blackstone's Commentaries [Cooley's 4th ed.], 5. So that it does not appear to us that the plaintiff committed any illegal act when she peacefully procured the removal of the wire fence with which the defendant had obstructed her passageway to the well. Consequently she does not appear in the attitude of one seeking the equitable enforcement of a right founded upon any illegal act committed by her.

It is also contended by appellant that the condition in the deeds of plaintiff and her grantor was too vague and uncertain to convey any rights in the well because the well was not described with such accuracy that it might be located by the aid of the deed alone. In the case of *Abbott v. Coates*, 62 Neb., 247, we held that a description in a deed may be aided by extrinsic evidence if it is possible by such evidence to make it accurate and complete. Now in view of the fact that there was but one well on these lots at the time the deed was executed from Cook to the plaintiff's grantor and also at the time the deed was executed by Cook to appellant, defendant below, we think that there can be no doubt as to what well was intended to be conveyed to plaintiff and her grantor, nor do we think there could be the least doubt as to what well was referred to in the reservation made in the deed from Cook to the defendant. If there ever was any possibility of a doubt arising from an ambiguity of description in these deeds such possibility must vanish in view of the joint action of the owners of the two lots when they came to construct a division fence, for when they did this they plainly recognized the appurtenant right conveyed in plaintiff's deed as well as the reservation contained in defendant's deed, by running the fence north and south along the line until the well was reached and then turning it east to the corners of the well curb, leaving a lane the width of the curb of the well. This was an unmistakable assertion of plaintiff's claim to the right of way to the well and defendant's acquiescence

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in this claim. *Gilmore v. Armstrong*, 48 Neb., 92, 66 N. W. Rep., 998.

We are, therefore, of the opinion that the judgment of the district court was right and should be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL. V. ELIZA A. LILLEY, ADMINISTRATRIX OF THE ESTATE OF MICHAEL W. LILLEY, DECEASED.

FILED FEBRUARY 17, 1903. No. 12,653.

Commissioner's opinion. Department No. 3.

1. **Negligence, When Question of Law for Court: DAMAGES: RAILROADS.** Without attempting an exact definition of what is, perhaps, not precisely definable, it may be said generally that when a person whose conduct is being considered has not been called upon suddenly and unexpectedly to choose, without time for deliberation, between two or more ways of escaping from imminent danger, and his course is such that its probable consequences may be predicted from the common and general experience and observation of ordinarily sane and prudent men, and when, moreover, there are not present other circumstances tending to obscure the usual and direct connection between cause and effect or to disturb the ordinary relation between antecedent and consequent; when, in short, from want of any more definite phrase, it may be said that "common sense" would have been sufficient to have assured him of safety or warned him of danger, the question whether he was negligent is one of law for the court and not one of fact for the jury.
2. **Negligence: WITHDRAWING ISSUE FROM JURY: DAMAGES: RAILROADS.** When, in an action to recover damages for an alleged negligently inflicted injury, there is evidence tending to prove contributory negligence by the party injured, it is error for the court to withdraw that evidence from the jury by an instruction which in substance directs a verdict for the plaintiff.
3. **Negligence: "LAST CLEAR CHANCE": DAMAGES: RAILROADS.** The rule known as the doctrine of the "last clear chance," as it has been adopted in some of our sister states, is in conflict with the law respecting contributory negligence as it has been settled by a long series of decisions by this court, and it will not be enforced in this state.

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ERROR from the district court for Butler county. Tried below before GOOD, J. *Reversed.*

J. W. Deweese, Frank E. Bishop and R. S. Norval, for plaintiffs in error.

According to the decisions, the railroad company has a right to operate its trains on the basis that trespassers or licensees upon its grounds will use their senses and keep out of the way of the engine; and that the company does not have to keep special lookout for the possible intruder, but only to keep the reasonable lookout necessary for the safety of the operation of trains, and that it is not liable except for reckless injury after discovery, when the injury could have been prevented. The company is bound to use the ordinary and usual means for stopping and saving the endangered person only after discovering the immediate danger, which can not otherwise be avoided. *Missouri P. R. Co. v. Hansen*, 48 Neb., at page 235; *Union P. R. Co. v. Clark*, 51 Neb., at page 222; *Swindell v. Chicago, B. & Q. R. Co.*, 44 Neb., at page 844; *Union P. R. Co. v. Mertes*, 39 Neb., 448, 453; *Chicago, B. & Q. R. Co. v. McGinnis*, 49 Neb., 649, 654; *Brady v. Chicago, St. P., M. & O. R. Co.*, 59 Neb., 233; *Missouri P. R. Co. v. Moseley*, 57 Fed. Rep., 921; *Chicago, B. & Q. R. Co. v. Yost*, 56 Neb., at page 444; *Wabash R. Co. v. Skiles*, 60 N. E. Rep. [Ohio], 576, 21 Am. & Eng. R. Cases, n. s., 881; *Loring v. Kansas City, Ft. S. & M. R. Co.*, 128 Mo., 349, 31 S. W. Rep., 6; *Elliott v. Chicago, M. & St. P. R. Co.*, 150 U. S., 245; *Aerkfetz v. Humphreys*, 145 U. S., 418; *Chattanooga, R. & S. R. Co. v. Downs*, 106 Fed. Rep., 641; *Louisville & N. R. Co. v. Hocker*, 64 S. W. Rep., 638, 23 Am. & Eng. R. Cases, n. s., 522; *Gahagan v. Boston & M. R. Co.*, 50 Atl. Rep. [N. H.], 146, 23 Am. & Eng. R. Cases, n. s., 141; *Royskoyek v. St. Paul & D. R. Co.*, 78 N. W. Rep. [Minn.], 872; *Spavin v. Lake Shore & M. S. R. Co.*, 90 N. W. Rep. [Mich.], 325; *State Trust Co. v. Kansas City, P. & G. R. Co.*, 111 Fed. Rep., 769, 771; *Sours v. Great N. R. Co.*, 87 N. W. Rep.

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[Minn.], 766; *Hunt v. Hurd*, 98 Fed. Rep., at page 687; *Martin v. Georgia Railroad & Banking Co.*, 22 S. E. Rep. [Ga.], 626; *Sharp v. Missouri P. R. Co.*, 61 S. W. Rep. [Mo.], 829, 830; *King v. Illinois C. R. Co.*, 114 Fed. Rep., 855, 862; *Schreiner v. Great N. R. Co.*, 90 N. W. Rep., [Minn.], 400; *Bess v. Atchison, T. & S. F. R. Co.*, 62 Kan., 299; *Missouri, K. & T. R. Co. v. Haltom*, 65 S. W. Rep. [Tex.], 625.

Where the testimony for the plaintiff develops facts from which a reasonable inference of negligence on the part of the plaintiff should be made by a jury, the burden is upon the plaintiff to clear himself from the imputation of his own neglect, as a cause of the injury. *Durrell v. Johnson*, 31 Neb., 796; *City of Lincoln v. Walker*, 18 Neb., 244; *Omaha Street R. Co. v. Martin*, 48 Neb., 65, 68; *Gahagan v. Boston & M. R. Co.*, 50 Atl. Rep. [N. H.], 146, 23 Am. & Eng. R. Cases, n. s., 141; *Davis v. Boston & M. R. Co.*, 49 Atl. Rep. [N. H.], 108; *Nashua Iron & Steel Co. v. Worcester & N. R. Co.*, 62 N. H., 159, 163; *Brooks v. Pittsburg, C. C. & St. L. R. Co.*, 62 N. E. Rep. [Ind.], 694; *Acrkletz v. Humphreys*, 145 U. S., 418; *Louisville & N. R. Co. v. Cromback*, 41 N. E. Rep. [Ind.], 15; *Guthrie v. Great N. R. Co.*, 79 N. W. Rep. [Minn.], 107; *Scott v. Pennsylvania R. Co.*, 130 N. Y., 679.

Matt Miller and T. S. Allen, contra.

There is no evidence that Lilley did not look and listen when he went upon the track. The presumption of law is that he did look and listen. *Texas P. R. Co. v. Gentry*, 163 U. S., 353; *Baltimore & O. R. Co. v. Griffith*, 159 U. S., 603, 609; *Schum v. Pennsylvania R. Co.*, 52 Am. Rep. [Pa.], at page 470.

It was for the jury to say whether or not the railway company used proper effort to stop the train and avoid the injury. *Swindell v. Chicago, B. & Q. R. Co.*, 44 Neb., at page 845.

The law is that it is the duty of the engineer to exercise

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and keep a careful look-out. *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb., at page 101; *Virginia M. R. Co. v. White*, 34 Am. & Eng. R. Cases, 22; *Reilly v. Hannibal & St. J. R. Co.*, 34 Am. & Eng. R. Cases, 81.

"Although the plaintiff has negligently exposed himself to an injury, yet if the defendant, after discovering the exposed condition, inflicts the injury upon him through a failure to exercise ordinary care, the plaintiff may recover damages." *Union P. R. Co. v. Mertes*, 35 Neb., at page 211; *Shearman and Redfield, Law of Negligence* [5th ed.], section 25; *Burnett v. Burlington & M. R. R. Co.*, 16 Neb., at page 336; *Dailey v. Burlington & M. R. R. Co.*, 58 Neb., at page 401; *Brotherton v. Manhattan Beach Improvement Co.*, 48 Neb., 563.

It was the duty of the defendant, knowing that at this particular time the yards were full of workmen going to their homes after the day's work was done, to exercise an extra degree of care. *Union P. R. Co. v. Elliott*, 54 Neb., 299; *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb., at page 646; *Chicago, B. & Q. R. Co. v. Wilgus*, 40 Neb., 660; *Omaha & R. V. R. Co. v. Wright*, 47 Neb., at page 891.

The question of negligence is one of fact for the jury when a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or contributory negligence. *Chicago, B. & Q. R. Co. v. Pollard*, 53 Neb., at page 741; *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb., at page 860; *Omaha Street R. Co. v. Martin*, 48 Neb., 65; *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb., 645; *Omaha & R. V. R. Co. v. Crow*, 47 Neb., at page 95; *Union Stock-Yards Co. v. Goodwin*, 57 Neb., at page 143.

It is the settled law in Nebraska and everywhere else that it is the duty of an engineer on a moving train to maintain a reasonably vigilant lookout, and his failure to do so must be the omission of a legal duty. And if, by the performance of that duty, an accident might be averted, notwithstanding the previous negligence of another, the breach of that duty would be the proximate cause of an

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injury and the company would be liable. In other words, the principle, that one whose duty it is to see does see, is applicable here. This is the doctrine of the "last clear chance." *Smith v. Norfolk & S. R. Co.*, 114 N. Car., 728, 25 L. R. A., 287; *Pickett v. Wilmington & W. R. Co.*, 30 L. R. A. [N. Car.], 257; *Bogan v. Carolina C. R. Co.*, 129 N. Car., 154, 55 L. R. A., 418.

AMES, C.

This is an action in which the defendant in error recovered a judgment as administratrix of the estate of Michael W. Lilley, because of the death of the latter by the alleged negligence of the plaintiff in error. The circumstances of the injury resulting in the death were as follows:

Lilley was a carpenter employed by the railroad company in repairing freight cars in its yards at Lincoln. The accident, in which he lost his life, occurred on January 28, 1901, in the north end of the railroad freight yards on the tracks immediately adjacent to the place where he had been at work repairing cars for over two months before that day.

The railroad company has extensive freight yards and tracks on the west side of the city of Lincoln, between the viaduct over O street, and the railroad roundhouse five or six blocks north of it. These tracks lie parallel to each other in a north and south direction. Toward the north end of that freight yard are several tracks which unite in going over a combined three-throw-switch at a part of the yard which is commonly nick-named the "Bull Ring." These switches open upon many tracks both east and west of a main line track which runs north and south directly through the switches. Immediately opposite this combined switch on the west side of the main line track is a small shanty in which a switchman is sheltered while he operates the combined switches, and has a general supervision of the switching in that end of the yard.

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This shanty is known as the "Bull Ring Shanty." There are no switch tracks immediately west of this main line track passing the Bull Ring Shanty. But beyond an open space of fifty or sixty feet west of this main line there are located several other tracks which are not used for switching or making up trains, but are used to hold freight cars while they are being repaired and put in condition for operation. These tracks are known as the repair tracks, and this was the place where Lilley had worked for over two months before his death, as a carpenter repairing freight cars. He was engaged at the work with some thirty or forty other men, during the time of his employment.

The Bull Ring section of the freight yard is a very busy place. All of the freight trains from the northwest lines and from the Omaha lines enter the yards over this combination switch and are there broken up by switch engines and arranged into trains ready to proceed in other directions upon the road. Switch engines constantly ran back and forth over this combination switch, and past the switch shanty within fifty feet of the repair tracks, day and night, during the time Lilley was engaged in repairing cars. There are no other structures than the switch shanty, either west, east or south of the switch shanty, and the view that way was unobstructed.

At about 5:30 o'clock on the evening of the accident, Lilley finished his day's work and walked across the open space between the repair tracks and the main track, in a course immediately north of the switch shanty, to a point at or near the main track. Thus far there is no apparent conflict in the testimony, nor is there any dispute that either at the point of his approach to the main track or at some place a short distance further north, he stepped between the rails of the track and was run over by a switch engine and killed.

There were five witnesses only who testified to any knowledge of the circumstances. These all say that the place at which the deceased was struck by the engine was

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at a distance of about one hundred feet north of the point at which he first approached the track. Two of these witnesses, called by the plaintiff, were Grosscup, a fireman upon the engine, and Corbin, an employee upon the grounds. The former testified that after Lilley had come near the track he turned north and walked at a safe distance therefrom in an open space until he suddenly stepped between the rails not more than six or eight feet in front of the moving engine. The latter saw the deceased just as he stepped between the rails as described by Grosscup, but does not appear to have seen him previously. Two other witnesses, also employed upon the grounds, saw the deceased only at the instant of the collision. The engineer was upon the opposite side of the engine from the deceased and his view was so obstructed thereby that he did not see the latter until after the accident happened. Higby, a witness for the administratrix, testified that he was some three hundred and fifty or four hundred feet northeast from the deceased when he first saw him upon the track, a little north of the shanty, and at a distance, as he thought, of one hundred and fifty to two hundred feet from the place where he was struck; but the evidence shows that the distance was at the most considerably less than one hundred feet. Hyatt, the remaining witness for the administratrix, testified that when he was about two hundred feet south of the shanty he was passed by the engine with one car attached, and that at that time he saw the deceased step upon the track at or near the shanty, and turn and walk rapidly towards the north and that the latter continued upon the track until he was struck and killed. It was agreed by all the witnesses that there was no obstruction to the view upon the main track, and Hyatt said that the engine when it passed him was exhausting steam violently and throwing out large volumes of smoke. All the witnesses for the company testified that the engine bell was kept ringing all of the time and are not disputed, except inferentially, by Higby and Hyatt, who said they did not hear it. There was a head-

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light burning and at and shortly before the happening of the collision the steam had been turned off and the air-brake applied, in the course of ordinary operation, so that the engine was not running more than four or five miles per hour at the instant of collision. But it was impossible to stop the engine moving at that speed in less than twenty or twenty-five feet. On the instant that the fireman discovered deceased was stepping upon the track he signalled the engineer and assisted him to apply the emergency brake so that the engine was stopped within the shortest possible time. All the witnesses agree that neither at the time Lilley stepped upon the track nor afterwards did he look backward or toward the south. If he had done so he would, according to the witnesses for the company, have seen the engine moving within seven or eight feet of him; according to the witnesses for the administratrix he would have seen it approaching two hundred feet away at a speed, at that time, of at least fifteen or twenty miles an hour, at which rate it would have overtaken him in from six to nine seconds or as soon as he would have walked, at the ordinary gait of three miles per hour, from ten to fifteen paces.

At the beginning of the discussion it will be convenient to assume, temporarily, that the jury believed the testimony in behalf of the prosecution rather than that of the defense and that that evidence is sufficient to convict the latter of negligence. The inquiry will thus be narrowed to one of contributory negligence. It should be premised, however, that a servant assumes the ordinary and obvious risks of his employment. *Evans Laundry Company v. Crawford*, 67 Neb., 153. Among these risks are, of course, the patent dangers attendant upon going to and from the place where his services are to be performed.

So far as we have been able to discover, courts and text writers have alike failed to announce a comprehensive definition of what is to be regarded as negligence as a matter of law, or negligence *per se*, as it is usually called. The reason is, we presume, that it is a matter dependent upon

so many varying circumstances, that words of precise description are not infrequently not applicable to it. But perhaps an approximate definition may be phrased as follows: When a person whose conduct is being considered has not been called upon suddenly and unexpectedly to choose, without time for deliberation, between two or more ways of escaping from imminent danger, and his course is such as that its probable consequences may be predicted from the common and general experience and observation of ordinarily sane and prudent men, and when, moreover, there are not present other circumstances tending to obscure the usual connection between cause and effect, or to disturb the ordinary relation between antecedent and consequent: when, in short, from want of any more definite phrase, it may be said that "common sense" would have been sufficient to have assured him of safety or warned him of danger, the question whether he was negligent is one of law for the court and not one of fact for the jury. In other words, if, having an opportunity to observe his surroundings he deliberately adopts a course of conduct which is attended with danger, or adopts such a course without deliberation, he assumes the consequences of so doing, and he can not, in a civil action, recover damages for a resulting injury, although without the concurring negligence of another person such injury would not have happened. Wharton, Negligence, section 420, *et seq.*, and notes; 1 Thompson, Negligence, section 436.

For more than sixty days the deceased had been employed in these yards and knew, from daily observation, that engines and cars were continually passing and re-passing over the railway track upon which he chose to walk. Without taking the slightest precaution to observe whether his pathway was then, or was then about to be, subjected to such use, he stepped and walked upon the track as above stated. That he might have escaped injury by so doing was possible, but that he incurred great danger by that course he must, if he had stopped to reflect, have

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been fully conscious. If he failed to reflect, that failure was itself negligence. If the testimony of the witnesses for the prosecution, Higby and Hyatt, is true, the deceased had, after he stepped between the rails, from six to nine or ten seconds within which he might, with ordinary precaution, have observed the approach of the engine and within which by taking two or three steps he might have put himself in a place of safety. If he had seen it and had remained on the track for so long a time, his negligence would not be the subject of discussion. Knowing as he did, the circumstances, and the constant use to which the tracks were being put, his failure to see it was equally unquestionable negligence. We are unable to distinguish this case in principle from that of *Chicago, B. & Q. R. Co. v. Yost*, 56 Neb., at page 444, from the opinion of this court, in which, we quote the following:

"A person may have gone upon a railway track under such circumstances as would exonerate him from the charge of negligence. But in the case at bar the record discloses no excuse whatever for Yost's going on this track without looking to the east. This is not a case in which he was in a position of danger and in his confusion chose the more dangerous of two ways; nor is it a case in which he went from a place of safety into one of danger in an attempt to save life or property. * * * Nor is this a case in which a section man, while in the performance of his duties on the track, was hurt by an engine creeping upon him without giving any signal of its approach, as in *Union P. R. Co. v. Elliott*, 54 Neb., 299. Yost had just been warned off this track because of the danger of the approaching engine and train, and he left a place of safety and heedlessly and carelessly stepped back on the track without exercising any care whatever for his safety by looking east on the track to see if there was a train or an engine following.

"Yost's argument is that the railway company was guilty of negligence in permitting this switch engine to follow so close to the gravel train. It may have been guilty

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of negligence in that respect, but if so, the answer is that such negligence was not the proximate cause of Yost's injury.

" * * * As to whether the other engine sounded a whistle at the time it approached the crossing it may be said there is a conflict in the evidence; but assuming that no signal was given by the switch engine at that time, that neglect did not cause Yost's injury. Yost alleged in his petition that he had been injured through the negligence of the railway company, without fault on his part and while in the exercise of ordinary care. The evidence does show that he was injured. We assume that it shows that the railway company was guilty of negligence, but the evidence does not sustain his contention that he himself was at that time in the exercise of ordinary care, but on the contrary it affirmatively shows that the proximate cause of his injury was his own neglect."

Cases from the courts of other states involving the same principle might be quoted almost *ad libitum*. *Wabash R. Co. v. Skiles*, 60 N. E. Rep. [Ohio], 576, 21 Am. & Eng. R. Cases, n. s., 881; *Gahagan v. Boston & M. R. Co.*, 50 Atl. Rep. [N. H.], 146, 23 Am. & Eng. R. Cases, n. s., 141; *Royskoyek v. St. Paul & D. R. Co.*, 78 N. W. Rep. [Minn.], 872; *Spavin v. Lake Shore & M. S. R. Co.*, 90 N. W. Rep. [Mich.], 325; *Sours v. Great Northern R. Co.*, 87 N. W. Rep. [Minn.], 766.

Thus far the discussion has proceeded upon the theory that in instances of conflict the testimony of the witnesses for the prosecution is to be accepted to the exclusion of that of those for the defense. Continuing upon this assumption, we are not convinced that there is sufficient evidence to convict the railway company of negligence. The engine, so far as appears, was properly constructed and equipped, the head-light was in use and there is positive evidence that the bell was ringing, and no affirmative evidence that it was not. The engine at the time of the collision was moving at the speed of a fast walk and was being operated in the customary manner. The men em-

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ployed upon the grounds were of mature years and were skilled mechanics, and therefore presumably of more than ordinary intelligence. They were familiar with their surroundings and with the use to which the main track was being put and with the dangers incident to that use. The enginemen were in their proper places and attentive to their duties. They had no reason to anticipate that any one would intrude between the rails or that, if he did so, he would not provide for his own security by keeping a sharp lookout for an approaching engine and betaking himself, when occasion should require, to a place of safety. In other words, there was nothing in the circumstances or surroundings having a tendency to arouse in them or either of them an apprehension of imminent or unusual danger to any person, but on the contrary they might reasonably have inferred therefrom a condition of comparative immunity from accident. Within the meaning of the rule above formulated and within the purview of the authorities above cited, they can not lawfully be adjudged guilty of negligence. As is said by this court in *Missouri P. R. Co. v. Hansen*, 48 Neb., 235:

“Ordinarily an engineer has a right to presume that persons walking along the track are in possession of their senses and will appreciate the danger and act with discretion; and he is under no obligation to stop the train, or even lessen the speed thereof, before discovering that such person is heedless of warnings given of the approach of the train, or otherwise in imminent peril. A mere failure to stop a train when a trespasser is seen, or should be seen, upon the track, can therefore create no presumption of negligence.”

But we are by no means satisfied that the jury adopted the testimony of the witnesses for the prosecution to the exclusion of that of those for the defense, or that they felt themselves bound to give much attention to any of the evidence. The court gave to the jury the following instruction, which was excepted to:

“If the jury believe from the evidence that Michael W.

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Lilley negligently went upon the track of the defendant company and exposed himself to injury, still the defendant engineer and railroad company would have no right to kill him because he was upon the tracks of the defendant company. If the jury believe from the evidence that the defendant engineer could, by the exercise of ordinary care, have seen Lilley upon the tracks of the defendant company in time to have stopped the engine, and thereafter negligently ran over and killed him, the defendants would be liable in this action, and your verdict should be for the plaintiff."

This instruction withdrew from the jury the question of contributory negligence altogether and decided it as a matter of law in favor of the plaintiff. It told them explicitly that if the enginemen were negligent the plaintiff was entitled to recover notwithstanding the concurrent negligence of the deceased might have contributed to the accident, and it left them at liberty to infer negligence by the company from the mere fact of the killing. So to instruct was to ignore, or rather to negative, the settled law of this state which has been established by a multitude of decisions by this court. The giving of this instruction was doubtless due to a confusion in the mind of the court of the law relative to contributory negligence, with what has lately come to be known as the new "last clear chance" doctrine. *Smith v. Norfolk & S. R. Co.*, 114 N. Car., 728, 25 L. R. A., 287; *Pickett v. Wilmington & W. R. Co.*, 30 L. R. A. [N. Car.], 257; *Bogan v. Carolina C. R. Co.*, 129 N. Car., 154, 55 L. R. A., 418.

In the case last cited the principle announced is expressed in the syllabus as follows:

"A railroad company is liable for injuring, by means of its train, a person negligently walking on its trestle without ability to save himself from the injury, if those in charge of the train discovered, or by the exercise of ordinary care might have discovered, the peril of the injured person, and might, by the exercise of such care, have avoided the accident."

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We submit that the doctrine here laid down, notwithstanding the excessive subtlety of the reasoning by which it is supported by the court announcing it, is inconsistent with that of contributory negligence which obtains in this state, and that both doctrines can not subsist in the same jurisdiction at the same time. Ordinary care by a person in the performance of daily tasks is that degree of care which men of ordinary prudence exercise under the ordinary and unusual circumstances of their occupations. If lack of such care results in the injury of one who is guiltless of negligence the latter is entitled to recover damages, but if the person injured has contributed to the misfortune complained of, by his own negligence, he is remediless. It is not until the person first alluded to has become aware of some fact or circumstance productive of unusual or extraordinary danger that a duty to exert increased vigilance is imposed upon him. It is the duty of railroad enginemen to keep a lookout for such objects and obstructions upon the track ahead of them as under ordinary or known circumstances are frequently or likely to be found thereon, and from injuries resulting solely from their failure so to do their employer is liable in damages, but if the injury is due in part to the negligence of the party injured, the employer is not liable. If the circumstances or surroundings are unusual and such as to arouse an extraordinary apprehension of danger, or if the enginemen in the exercise of ordinary care, discover a person in a position of peril from which by the exertion of additional effort or vigilance they have an opportunity to extricate him, and fail to make use of such effort or vigilance, they are guilty of a new act of negligence with which the person in peril does not concur or contribute. To adopt the doctrine of the so-called "last clear chance" decisions, would be to require not only of railway enginemen, but of all other users of dangerous or ponderous machinery, the constant exertion of that extreme degree of vigilance and care which ordinarily prudent men employ only in cases of extreme and unusual peril.

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To our minds such a requirement would be impracticable and unjust, but if the "last clear chance" rule is to be adopted it should be done frankly and openly, without any of the delusive limitations and qualifications of the jurisdiction of its origin, which, in practice, do not limit or qualify, and the hitherto prevailing rule as to contributory negligence ought to be explicitly and decisively abrogated and set aside. The rule of law is not difficult of statement and business men, litigants and lawyers have a right, if it is adopted, to its unequivocal announcement. We do not suppose that this court will for a moment contemplate so radical and revolutionary a change in the jurisprudence of this state. We are of opinion that, upon the evidence disclosed by this record, the request of the defense for a peremptory instruction in its behalf should have been granted.

It is recommended that the judgment of the district court be reversed and a new trial granted.

DUFFIE and ALBERT, CC., concur.

REVERSED AND REMANDED.

Opinion on rehearing follows.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY
ET AL. V. ELIZA A. LILLEY, ADMINISTRATRIX OF THE
ESTATE OF MICHAEL W. LILLEY, DECEASED.

FILED NOVEMBER 18, 1903. No. 12,653.

Commissioner's opinion. Department No. 3.

Negligence: DAMAGES: RAILROADS. The conclusion reached in the former opinion, *Chicago, B. & Q. R. Co. v. Lilley, ante*, page 286, 93 N. W. Rep., 1012, adhered to.

REHEARING of case reported *ante*, page 286.

ERROR from the district court for Butler county. Tried

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below before GOOD, J. *Former judgment of reversal adhered to.*

J. W. Deweese, Frank E. Bishop and R. S. Norval, for plaintiffs in error.

Matt Miller and T. S. Allen, contra.

POUND, C.

The facts are fully stated, so far as necessary to an understanding of the points involved in this case, in the opinion of our brother AMES, upon whose recommendation this rehearing was granted. Upon further argument and re-examination of the record, we are of opinion that his conclusion was correct and should not be disturbed. It will not be necessary to enter into all of the questions discussed in the former opinion. To our minds the cause is completely disposed of by the statement in the former opinion, which we regard as correct and entirely justified by undisputed evidence, that the plaintiff's intestate, without taking the slightest precaution to observe whether his pathway was then, or was then about to be, in immediate use by a moving locomotive engine, stepped and walked upon the track in front of such engine. We think the evidence shows so clearly that the death of plaintiff's intestate was due solely to his negligence in going upon a track upon which an engine was approaching, without taking any precaution to ascertain whether or not the track was clear, as to preclude a recovery. There is no real conflict upon this point. A witness who was several hundred feet distant, behind the engine, and walking in the same direction with the engine, which was between him and the deceased, states that the deceased was walking, not along the track but upon it. This testimony, however, in view of his situation with reference to the place of the accident, is not sufficient to justify a verdict in view of the clear and overwhelming testimony of those immediately in a position to see that he was not upon the track,

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but was walking by the side of the track until he turned suddenly to cross it immediately in front of the engine. It is contended also that certain cars interposed between him and the approaching engine at the time he started to walk along the track. Upon careful reading of the record, however, it appears that these cars were not in such a place, according to the testimony of all the witnesses, as to obstruct the view of anyone who looked carefully to see whether an engine was approaching. Believing that the former opinion is entirely right upon this crucial point, and in view of the fact that such opinion is not to be officially reported, we do not deem it necessary to consider the other questions discussed therein. We may say, however, that we think counsel are under a misapprehension with reference to that portion of the opinion which observes that the commissioners were "by no means satisfied that the jury adopted the testimony of the witnesses for the prosecution to the exclusion of that of those of the defense, or that they felt themselves bound to give much attention to any of the evidence." We do not understand this to be intended as a reflection upon the jury, but to indicate a view, with which we are inclined to agree, that the instructions of the trial court were such as to be liable to create an inference that the company was liable solely by reason of the fact that the plaintiff's intestate had been killed. Among other things, the trial court instructed that the railroad company "had no right to kill the deceased." The connection in which this phrase was used was not such as to make it clear to the lay mind that the mere killing of decedent by the company's engine did not give rise to a cause of action.

We therefore recommend that the former judgment be adhered to.

DUFFIE and KIRKPATRICK, CC., concur.

FORMER JUDGMENT ADHERED TO.

Black v. Fuller.

FRANK J. BLACK V. CLOUD H. FULLER, SHERIFF OF
PAWNEE COUNTY, ET AL.

FILED FEBRUARY 17, 1903. No. 12,659.

Commissioner's opinion. Department No. 2.

Chattel Mortgages: SALES BY MORTGAGOR IN POSSESSION: VALIDITY.

Where, either by the terms of the mortgage or by contemporaneous understanding, the mortgagor of chattels in possession thereof is permitted to sell the goods in the ordinary course of trade for his own benefit, such mortgage is fraudulent and void as to creditors.

ERROR from the district court for Pawnee county.
Tried below before STULL, J. *Affirmed.*

Story & Story, for plaintiff in error.

J. C. Dort and *E. A. Tucker*, contra

POUND, C.

The chattel mortgage involved in this case, so far as material, reads as follows: "A stock of drugs and fixtures, including soda fountain, located in the city of Table Rock, Nebraska, in the Sutton Bldg., under the opera house, and the transfer of said stock of goods to include the stock of goods as per invoice, not including the commission goods, with the privilege to sell, and transfer mortgage, and said stock to be kept insured, and reports to be made to F. J. Black monthly of goods bought and sold." It appears in evidence that the mortgagors, remaining in possession, sold the mortgaged goods from time to time at retail in the ordinary course of trade, making monthly reports to the mortgagee of the goods sold. The latter testifies that these reports were required in order to enable him to know that the stock was being kept up. In other words, the mortgagors were permitted by the express terms of the mortgage, and by the agreement of the parties at the time it was executed, to sell at

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retail in the ordinary course of trade for their own benefit, applying the proceeds to their own use upon merely keeping a certain amount in stock. This operated necessarily and inevitably as a fraud upon general creditors. *Tallon v. Ellison*, 3 Neb., 63; *Hedman v. Anderson*, 6 Neb., 392; *Gregory v. Whedon*, 8 Neb., 373; *Sherwin v. Gaghagen*, 39 Neb., 238; *Paxton & Gallagher v. Smith*, 41 Neb., 56; *Buckstaff Bros. Mfg. Co. v. Snyder*, 54 Neb., 538. It is claimed that the power of sale contained in the mortgage does not include permission to sell the fixtures. But we see no ambiguity in the provision in question affording any ground for the admission of extrinsic evidence, and on its face it clearly refers to all the mortgaged property. The parties seem to have thought that they could impose a lien upon the stock and fixtures, so that no other creditor could come at them, and yet permit the mortgagor in possession to deal with them in all respects as his own and for his own benefit. No amount of evidence of good intentions will overcome the intrinsically fraudulent character of such a proceeding. *Buckstaff Bros. Mfg. Co. v. Snyder, supra*.

We recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

GEORGE F. SAWYER V. JACOB BENDER ET AL.

FILED FEBRUARY 17, 1903. No. 12,663.

Commissioner's opinion. Department No. 3.

Mortgages: FORECLOSURE: DEFICIENCY: RENDERED AT SUBSEQUENT TERM: JURISDICTION. Prior to the passage of the act of 1897, relative to judgments for deficiency in actions for the foreclosure of mortgages, the court did not lose jurisdiction to render such a judgment by failure to exercise it at the term at which the sale of the mortgaged premises was confirmed.

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ERROR from the district court for Saline county. Tried below before STUBBS, J. *Reversed.*

Geo. H. Hastings, for plaintiff in error.

Abbott & Abbott and *Joshua Palmer*, *contra.*

AMES, C.

This was an action to foreclose a mortgage in which the petition alleged that both the defendants, who are husband and wife, executed the note secured by the mortgage and were personally liable thereon. There were the usual findings in favor of the plaintiff, and a decree of foreclosure and a consequent advertisement and sale of the mortgaged premises. The report of sale showed that the sale was for an amount less than sufficient to pay the debt. The sale was thereupon confirmed, and pursuant thereto the sheriff conveyed the lands to the purchaser.

Several years after the making of the order of confirmation, in which no mention was made of the deficiency of the proceeds of the sale for the payment of the decree, the plaintiff applied to the court, by motion and upon notice to the defendants, for the rendition of a judgment for the amount of the deficiency. It is conceded by the parties that the act of 1897, relative to judgments of this character, is inapplicable to the case at bar. The court dismissed the proceeding upon the ground that jurisdiction to render the judgment applied for was lost by the adjournment of the term at which the confirmation was ordered without a previous motion therefor having been filed. The plaintiff prosecutes error to this court.

The objection to the jurisdiction is grounded upon the language of section 847 of the Code as it formerly existed, which conferred power upon the court to render such a judgment "on the coming in of the report sale"; and it is contended that the power, being derived solely from the statute, existed at no other time unless a proceeding

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had been actually begun and continued to a subsequent term. We think this construction of the statute is too literal. Section 849 provided that if a person other than the mortgagor was a party to the suit and was bound for the mortgage debt, the court might "after a sale of the mortgaged premises" decree the payment of an unsatisfied balance of such debt as well against such other person as against the mortgagor. No definite time for the exercise of this power is fixed by this section, which is later in order of sequence than the former section, and we are led to infer from that fact that the legislature did not intend to confine the action of the court to the term of the confirmation. We can see no sufficient reason for such an intent. All the facts necessary to the ascertainment of the amount of the deficiency had at and before that term been determined, so that, in most cases, the rendition of a judgment therefor would barely rise to the dignity of a judicial act, and we think that the power to perform it would not lapse until the obligation, if valid, should be satisfied or become barred by the statute of limitations.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings.

DUFFIE and ALBERT, CC., concur.

REVERSED AND REMANDED.

JOSEPHINE HASLACH, APPELLEE, V. THEODORE WOLF ET AL.,
APPELLEES, IMPEADED WITH W. H. BECK, APPELLANT.

FILED MARCH 4, 1903. No. 12,164.

Commissioner's opinion. Department No. 1.

Appeal and Error: EVIDENCE SUPPORTS FINDINGS: ACCOUNT. Where, in an action for an accounting, questions of fact only are presented and the trial court's findings are supported by the evidence, the decree will not be disturbed.

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APPEAL from the district court for Platte county. Tried below before HOLLENBECK, J. *Affirmed.*

McAllister & Cornelius, for appellant.

Reeder & Hobart, contra.

LOBINGIER, C.

This is a part of the litigation represented by cases between the same parties reported in 65 Neb., 303, 91 N. W. Rep., 283, and 66 Neb., 600, 92 N. W. Rep., 574. In this case Mrs. Haslach sued Wolf on a promissory note for \$2,000, which had been transferred to the former by the payee, Beck. Wolf answered admitting the execution of the note, but alleging that plaintiff was an indorsee with notice and without consideration; that he and Beck were partners and that the latter had received from the partnership more than \$2,000 above what he was entitled to and that he was insolvent. Wolf prayed that Beck be made a party and for an accounting. An order was accordingly entered making Beck a party, and he, apparently treating Wolf's answer as a petition, admitted the partnership, but pleaded by way of cross-petition that Wolf had appropriated a large amount of real and personal property listed in a schedule which was attached to the pleading. An agreement was also alleged about the time the firm began business, to the effect that Beck was to devote his whole time to the management thereof, for which he was to receive \$60 per month for his services, amounting in all to \$4,560, and a subsequent agreement was alleged by which he was to receive an allowance of \$30 per trip for traveling expenses, under which he claimed \$1,200 more. He also prayed for an accounting. Upon a hearing the trial court found as follows on this branch of the case:

"As to the issues joined between the defendants Theodore Wolf and William H. Beck the court finds that the account and items of charges of one against the other including the note mentioned in plaintiff's petition have

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been adjusted and settled and balance each other respectively except such real and personal property as may still remain in the hands of said defendants. To which finding both defendants except."

A decree was rendered accordingly and each of the parties was required to pay his own costs. Beck appeals from this decree. But while Wolf excepted, and while his counsel in their brief express dissatisfaction with portions of the decree, we are not advised of any cross-appeal.

No question of law is discussed in the briefs, and the issues presented were peculiarly within the province of the trial judge to determine. Thus, on the question of Beck's claim for compensation, which is the one most prominently presented in his cross-petition, Beck testified to an oral agreement or understanding of that kind, while Wolf swore that the first he had heard of it "was here in this court-room on the stand." Clearly the trial judge was in a much better position than we are to pass upon this question and determine the credence to be given the two parties.

The determination of the remaining issues in the case involved an investigation of the partnership accounts and all transactions between the parties extending over a long series of years. The evidence is voluminous; the record consisting of nearly two hundred pages of oral testimony besides a large number of depositions and exhibits. We do not think that any serviceable end would be promoted by discussing it here. The trial court found that the conflicting claims of the parties as to their general accounts balanced each other, and left the question as to title to the property undetermined. We are not prepared to say that its conclusions as to the issues decided by the decree are unsupported by the evidence. Applying the usual rule in such cases, we recommend that the decree be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

Hogsett v. Harlan County.

FRANK W. HOGSETT V. HARLAN COUNTY.

FILED MARCH 4, 1903. No. 12,414.

Commissioner's opinion. Department No. 3.

Highways: DAMAGES, WHEN ACCRUE: EMINENT DOMAIN. Damages for lands appropriated for a highway accrue at the date of the condemnation proceedings, without regard to the time when the road is actually opened. Following *Harlan County v. Hogsett*, 60 Neb., 362.

ERROR from the district court for Harlan county. Tried below before ADAMS, J. *Affirmed.*

John Everson, for plaintiff in error.

A. M. Beresford, contra.

ALBERT, C.

This case is before the court for the second time. The first time it was here under the title of *Harlan County v. Hogsett*, and the opinion is reported under that title in 60 Neb., 362, where the facts sufficiently appear. A second trial, in the district court, resulted in a finding and judgment for the defendant. The plaintiff brings error.

In the former opinion an obstacle in the way of plaintiff's recovery is clearly pointed out. The case is presented on substantially the same record, so far as the obstacle is concerned. The learned judge who prepared the former opinion left nothing to be said on that point, and we fully concur in the views expressed by him.

It is therefore recommended that the judgment of the district court be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

Opinion on rehearing follows.

Hogsett v. Harlan County.

FRANK W. HOGSETT V. HARLAN COUNTY.

FILED NOVEMBER 5, 1903. No. 12,414.

Commissioner's opinion. Department No. 2.

1. **Highways: DAMAGES: EMINENT DOMAIN: CONSTITUTION.** Section 21 of article 1 of the constitution provides that private property cannot be taken or damaged for public use without just compensation. Therefore a landowner cannot be required to surrender his land for a public road until his damages are first ascertained, and either paid or proper provision made for their payment.
2. **Highways: ESTABLISHMENT OF: APPROPRIATION, WHEN TAKES PLACE: EMINENT DOMAIN.** Where a resolution is adopted by a board of county commissioners or supervisors preparatory to establishing a road within a county for which they are acting, either without jurisdiction or without having proceeded upon proper notice to ascertain the damages to property owners caused thereby, and without having paid such damages or made suitable provision for their payment, the appropriation does not take place until the road is actually opened for public use.
3. **Highways: ESTABLISHMENT OF: DAMAGES, WHEN ACCRUE: EMINENT DOMAIN.** In such a case the right to recover the damages accrues to the person who owns the land when the road is actually opened.
4. **Highways: DAMAGES: ACTION FOR: DEFENSE: EMINENT DOMAIN.** The fact that the person who owned the land when the resolution was adopted, asked leave to present a claim for damages, which request was refused by the board, and an attempted appeal from such refusal has been dismissed, is no defense to an action, by the owner of the land at the time the road was actually opened, to recover his damages therefor.

REHEARING of same case reported *ante*, page 309.

ERROR from the district court for Harlan county. Tried below before ADAMS, J. *Judgment below reversed.*

John Everson and Flansburg & Williams, for plaintiff in error.

A. M. Beresford, contra.

BARNES, C.

This case has had a somewhat eventful history. It was first tried in the district court for Harlan county some

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years ago, and the plaintiff obtained a judgment for \$200. Error was prosecuted to this court; the judgment was reversed and the cause remanded for a new trial. The ground of the reversal was that the new matter of defense pleaded in the answer was not denied, no reply having been filed to said answer. When the case was remanded new pleadings were filed which raised new issues, to which our former decision has no application. At the second trial the case was submitted on the evidence taken upon the first trial, together with additional testimony introduced on the part of both the plaintiff and the defendant. This trial resulted in a judgment for the defendant, from which the plaintiff prosecuted error. When the case came before this court the second time it was submitted to department No. 3 of the commission, and ALBERT, C., who was then a member of that department, wrote an opinion affirming the judgment of the trial court which is reported *ante*, page 309, 93 N. W. Rep., 1001. A motion for a rehearing was sustained, and the case is now before us for the third time. It will appear from the opinion of the learned commissioner that he overlooked the fact that new pleadings had been filed in the case before it was tried the second time, and that neither the issues nor the evidence were the same as those passed upon in *Harlan County v. Hogsett*, 60 Neb., 362, hence the rehearing. We are now called upon to decide this case as though it were before us for the first time.

The record discloses that on or about the 14th day of November, 1892, the board of supervisors of Harlan county, the defendant herein, attempted to establish a public highway over and across section 16, township 1 north of range 18 west in said county; that at the time said proceedings were had one Henry Stewart was the owner and in possession of the land in question under a contract of purchase; that nothing was done towards opening the road from that time until the spring or summer of 1894; that meanwhile the plaintiff had purchased the land of Stewart, had obtained an assignment of his contract and

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his right of action herein, and had entered into possession of the premises. When the attempt was made to open the road, plaintiff filed his claim with the county board asking for damages to the amount of \$600 by reason of the location and establishment of said highway; his claim was rejected, and he appealed to the district court with the result above stated. The record discloses that no provision was ever made to pay for the land actually taken for the highway, or the damages to the balance of the tract; that neither Stewart nor the plaintiff have ever been paid anything on that account; that no assessment of any tax, or appropriation of money in any manner, has ever been made by the county to pay the plaintiff or the said Stewart therefor.

It is settled beyond question, by many decisions of this court, that, before private property can be taken or appropriated for public use, steps must be taken in the manner prescribed by law to appraise the damages occasioned by such taking and provide for their payment. *Propst v. Cass County*, 51 Neb., 736; *Livingston v. Board of County Commissioners of Johnson County*, 42 Neb., 277; *Welton v. Dickson*, 38 Neb., 767; *Lewis v. City of Lincoln*, 55 Neb., 1. An order of the county board establishing a road does not pass the title to the land; it simply locates the road; the action of the board on the claim for damages determines the amount which the county shall pay for taking and damaging the private property for public use, and until the county pays such damages no title passes. It is only the payment of the damages, or the providing of a fund in a proper manner for such payment, that complies with the constitutional requirements.

In *Propst v. Cass County*, *supra*, it was said: "To give section 21 of article 1 of the constitution full effect it is necessary that a corporation which purposes to appropriate private property for public use shall take such steps as may be necessary to determine the amount of damages resulting from such appropriation, and provide payment therefor. This duty should be in no way dependent upon

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whether or not a claim for damages has been filed by the person whose property is to be taken. If the amount of damages assessed for the taking of the property is deemed by the property owner inadequate, he may make a showing of that inadequacy before the county commissioners, who are authorized by section 26, chapter 78, Compiled Statutes [Annotated Statutes, section 6029], to increase the amount allowed by the appraisers, and thereafter may exercise his right of appeal; but in the first instance he is not required to take affirmative action as a condition upon which depends his right of compensation for taking his property for public use."

In *Hodges v. Board of Supervisors of Seward County*, 49 Neb., 666, the court (speaking of the constitution) said: "It requires that where private property is taken or damaged for public use, just compensation must be ascertained and paid before the appropriation. That this rule applies to counties and municipalities exercising the right of eminent domain has been frequently asserted by this court, and it is too well settled to require discussion." There must be an absolute provision for the payment of these damages, or the property can not be appropriated.

In this case it appears that there has been no such provision made, neither has there been any payment to any one of the damages caused by the location of the road in question. It also appears on the face of the record of the proceedings of the board of county commissioners which was introduced by the defendant as a part of its evidence on the trial in the district court that the board was without jurisdiction to make the order locating or establishing the highway in question. It follows that the plaintiff might have enjoined the opening of the road when such proceeding was attempted. He did not choose to pursue that remedy but brought this action to recover his damages for the wrongful and unauthorized acts of the defendant in appropriating his land for the highway. That this form of action was proper and can be maintained there can be no question. The owner of land across which

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a road has been established may sue for damages occasioned by the trespass where no proceedings whatever have been had for ascertaining the value of the property taken, and the injury to his freehold has not been ascertained and paid. *Omaha & N. W. R. Co. v. Menk*, 4 Neb., 21; *Ray v. Atchison & N. R. Co.*, 4 Neb., 439; *Douglas County v. Taylor*, 50 Neb., 535.

This brings us to the matters of defense, but one of which requires our attention. It is alleged in the defendant's answer that Henry Stewart, the owner of the land when the proceedings of the board were had, filed a claim before said board for damages alleged to have been sustained by reason of the location of the road, which was rejected; that he appealed from the action of the board and afterwards dismissed his appeal; that he thereby waived his right to recover any damages against the county, and that such waiver is a defense against the plaintiff's right to recover herein. On the trial the defendant failed to make proof of this defense as alleged in its answer. The record discloses that at the time the proceedings were had before the county board looking to the establishment of the road, and at the time the notice was published requiring land owners to file their claims for damages, Stewart was a non-resident of the state; that he had no notice of the proceedings in time to file his claim before the expiration of the time fixed by the notice for that purpose; but that on the 14th day of November following, and on the day when the order locating the road was made, he made an application through Mr. Flansburg, his attorney, for leave to file his claim for damages; that the board, acting under the advice of the county attorney, refused to grant him that privilege. It also appears that he attempted to appeal from the order refusing him the right to even present his claim; that after he had sold the land to the plaintiff he dismissed such attempted appeal and disclaimed any interest in the matter. So it appears that no claim for damages was ever filed by Stewart, while he owned the premises; that the board never passed upon

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the merits of any such claim by either allowing or rejecting it. This being true, if the defendant had attempted to open the road while Stewart owned the land he could have enjoined such proceeding until his damages were ascertained and paid; or he could have waived the irregularities and want of jurisdiction in the board to locate the road, and sued in trespass to recover the amount of his damages. Stewart having sold the land before any attempt was made to open the road, and assigned his contract and all his rights thereunder to the plaintiff, it follows that when the road was actually opened the land belonged to the plaintiff; it was his property that was appropriated; the right to recover the damages therefor was fully vested in him, and Stewart's attempt to file a claim for damages is no bar to the prosecution of this action. It would seem that the trial court, and also the learned commissioner who wrote the former opinion, were misled by the *obiter* statement of NORVAL, J., contained in the opinion in *Harlan County v. Hogsett*, 60 Neb., 362, in which he said: "Damages for lands appropriated for a highway accrue at the date of the condemnation proceedings without regard to the time when the road is actually opened." In other words, the appropriation dates at the time of the condemnation proceedings. This may be correct in some instances, but it is not the rule in all cases; especially is it true that it has no application to the facts in the case at bar because no condemnation proceedings such as are contemplated by the law were ever had in this case.

The rule announced in the case of *Lewis v. City of Lincoln*, *supra*, applies here, and is as follows:

"A resolution adopted by a board of county commissioners purporting to establish a section-line road, within the county for which they are acting, is valid as a preliminary order; but before such road can be actually opened there must be a proceeding upon proper notice to ascertain damages.

"Under section 21, article 1, of the constitution, which declares 'The property of no person shall be taken or

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damaged for public use without just compensation therefor,' a landowner can not be required to surrender his land for public use until his damages are first ascertained and either paid or proper provision made for their payment."

It follows that in the case at bar there could be no appropriation of the plaintiff's land until the road was actually opened, and until then the land was not taken for public use. *Propst v. Cass County, supra*; *Livingston v. Board of County Commissioners of Johnson County, supra*; *Bohlman v. The Green Bay & L. P. R. Co.*, 30 Wis., 105; *Wheeler v. The Essex Public Road Board*, 39 N. J. Law, 291; *Pearson v. Johnson*, 54 Miss., 259; *The City of Chicago v. Barbican*, 80 Ill., 482; *Bensley v. The Mountain Lake Water Co.*, 13 Cal., 306; *State v. Cincinnati & I. R. Co.*, 17 Ohio St., 103.

Under the facts disclosed by the record the plaintiff was entitled to recover at least the actual value of his land taken for public use by the opening of the road in question. We therefore recommend that our former judgment be vacated, that the judgment of the district court be reversed and the cause remanded for a new trial.

GLANVILLE, C., concurs.

REVERSED AND REMANDED.

ARCHIBALD S. SANDS ET AL., APPELLANTS, V. HENRY GUND
ET AL., APPELLEES.

FILED MARCH 4, 1903. No. 12,669.

Commissioner's opinion. Department No. 3.

Pleading: PETITION: WHAT IT MUST CONTAIN. A petition which does not allege that the defendant has violated any law or contract, or caused any injury or done any wrong or withheld any right or been guilty of any negligence or has threatened or is about to do any such thing, does not state a cause of action.

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APPEAL from the district court for Saline county. Tried below before STUBBS, J. *Affirmed.*

F. I. Foss, A. S. Sands, B. V. Kohout and R. D. Brown, for appellants.

J. H. Grimm & Son, contra.

AMES, C.

The petition in this action sets out, with a prolixity too great to be copied here, the following essential facts: On the 18th day of October, 1901, the Blue Valley Bank, a banking corporation organized under the laws of this state, went into liquidation because of the expiration of the term of its charter. At that time Henry Gund was the president, a member of the board of directors, and a large stockholder in the bank, and was obligated to it upon a promissory note, also signed by another, for the principal sum of \$4,841.50, and accrued interest for several years. Within about two and one-half months after the bank had ceased to do business, or on the 31st day of December, 1901, the board of directors, as trustees under the statute, had proceeded so far in winding up its affairs that they had paid all its depositors and creditors and had on hand sufficient funds to return to its stockholders 70 per cent. of the par value of their shares. On the latter date all of the stockholders entered into a written agreement of which the following is a copy.

"It is agreed between the stockholders of Blue Valley Bank that a dividend of 70 per cent. shall be paid to stockholders at once on presentation of stock certificates to E. Ballard for indorsement, and out of said dividend shall be charged any note held by the bank against such stockholders, including notes of Sasek-Prokop & Co. against A. S. Sands to the amount of \$1,225.84 and no money shall be paid any shareholder till his indebtedness to the bank is paid."

Pursuant to this agreement the trustees made payments

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to and settlements with all of the stockholders except Gund, but retained and still retain the dividend applicable to his shares to an amount exceeding the sum due upon his note, because of his refusal to permit the latter to be applied upon it.

On the 25th day of January, 1902, within less than a month after the execution of the above quoted agreement, the plaintiffs in error, who were owners of certain shares of stock in the bank, after having demanded of the trustees that they proceed by action to recover the sum due upon the note, begun this suit by a petition alleging the foregoing facts, and praying that the trustees be removed from their office, and that a receiver or trustee be appointed by the court with authority to conclude the winding up and settlement of the affairs of the bank, and for an order commanding one E. Ballard, one of said trustees, to indorse the amount of the note upon the certificates of stock of the said Gund, in payment by so much of said 70 per cent. dividend, or in case of Ballard's neglect or refusal requiring the receiver so to be appointed so to do, and for general relief. The trial court sustained a general demurrer to the petition and dismissed the action and the plaintiffs prosecute error.

It does not appear from the petition that the trustees have been in any way extravagant or negligent or dilatory in the performance of the duties of their office, or that they have violated any law or contract or caused any injury or done any wrong or withheld any right, or that they have threatened or are about to do any such thing. At least some one of these elements is essential to a cause of action.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

Moores v. Jones.

FRANK E. MOORES V. MEDORA ALLAYNE JONES.

FILED MARCH 4, 1903. No. 12,683.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: ASSIGNMENTS: NEW TRIAL, MOTION FOR, OVERRULING.** *Gandy v. Cummins*, 64 Neb., 312, 89 N. W. Rep., 777, and *Achenbach v. Pollock*, 64 Neb., 436, 90 N. W. Rep., 304, followed.
2. **Appeal and Error: ASSIGNMENTS FRIVOLOUS.** Assignments of error held without merit and frivolous.

ERROR from the district court for Douglas county. Tried below before FAWCETT, J. *Affirmed.*

Dexter L. Thomas, for plaintiff in error.

J. C. Kinsler and *W. K. Amick*, contra.

POUND, C.

But two errors are argued; one that the evidence does not establish plaintiff's ownership of the note sued on, the other that the judgment recites it is to draw interest at seven per cent. per annum.

There is no assignment of error in overruling the motion for a new trial, so that the first point would not be before us, if it had any merit. *Gandy v. Cummins*, 64 Neb., 312, 89 N. W. Rep., 777; *Achenbach v. Pollock*, 64 Neb., 436, 90 N. W. Rep., 304. But it has none. Plaintiff sues on a note given to her husband in his lifetime, which she received as a distributee of his estate. Aside from the presumption arising from her possession and production of the note, the evidence that it passed to her in due course of administration is full and complete, and there is nothing to the contrary.

The other point is settled by section 4, chapter 44, Compiled Statutes; *Connecticut Mutual Life Insurance Co. v. Westerhoff*, 58 Neb., 379; *Havemeyer v. Paul*, 45 Neb., 373.

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The proceedings in error are without merit and frivolous and we recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

JAMES I. GUMAER, APPELLEE, v. WILLIAM T. DAY ET AL.,
APPELLANTS.

FILED MARCH 4, 1903. No. 12,686.

Commissioner's opinion. Department No. 3.

Contracts: CONSTRUCTION: TITLE TO REBATE: SALE OF GOVERNMENT LAND: RESALE BY PURCHASER: REBATE BY GOVERNMENT. Appellee purchased certain lands from the United States at a price much above their appraised value, paying one-fourth of the purchase price in cash. Before any further payments had been made he sold part of the lands to appellants who, in addition to a cash payment, agreed to assume and pay to the government the unpaid three-fourths of the original purchase price. Prior to this sale appellee and other purchasers of like lands were pressing a claim to have the government remit from the purchase price of their lands all sums in excess of the appraised value thereof and as a part of the contract of sale from appellee to appellants it was agreed that if the government should make this rebate appellee was to receive one-half thereof or of any amount of which rebate should be granted. *Held*, That the contract was valid and should be enforced.

APPEAL from the district court for Gage county. Tried below before LETTON, J. *Affirmed*.

Hugh J. Dobbs and *A. D. McCandless*, for appellants.

Certainty in regard to time is required in contracts in order to make them valid.

ORDINARY CONTRACTS.—Bishop, Contracts, section 390; *Schwanbeck v. Smith*, 77 Md., 314; *Wells v. Alexandre*, 15 L. R. A. [N. Y.], 218; *Pistel v. Imperial Mutual Life Ins. Co.*, 43 L. R. A. [Md.], 219; *Hall v. First National Bank*, 44 L. R. A. [Mass.], 319; *Davie v. The Lumberman's Mining Co.*, 93 Mich., 491; *Gelston v. Sigmund*, 27 Md., 334,

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343; *Fairplay School Township v. O'Neil*, 127 Ind., 95; *Thomson v. Gortner*, 73 Md., 474; *Cummer v. Butts*, 40 Mich., 322; *Barnard v. Cushing*, 4 Met. [Mass.], 230; *Nelson v. Von Bonnhorst*, 29 Pa., 352; 3 Am. & Eng. Ency. Law [1st ed.], 842 and notes.

BILLS AND NOTES.—*Dorsey v. Wolff*, 142 Ill., 589; *Carnwright v. Gray*, 127 N. Y., 92; 1 Daniels, Negotiable Instruments [4th ed.], sections 41, 46; *Burgess v. Fairbanks*, 83 Cal., 215; *Munez v. Dautel*, 19 Wall. [U. S.], 560; *Guyman v. Burlingame*, 36 Ill., 201; *Specht v. Biendorf*, 56 Neb., 553; *Eldred v. Malloy*, 2 Colo., 320; *Haskell v. Lambert*, 16 Gray [Mass.], 592; *Grant v. Wood*, 12 Gray [Mass.], 220; *Husband v. Epling*, 81 Ill., 172; *Corbett v. Georgia*, 24 Ga., 287; *Brooks v. Hargraves*, 21 Mich., 254; *American Exchange Bank v. Blanchard*, 7 Allen [Mass.], 333; *Tompkins v. Ashby*, 6 B. & C. [Eng.], 541; *Melanotte v. Teasdale*, 13 M. & W. [Eng.], 216; *Ellis v. Ellis*, Gow. [Eng.], 216; *Roberts v. Peake*, 1 Burr [Eng.], 323; *Shelton v. Bruce*, 9 Yerg. [Tenn.], 24; *Salinas v. Wright*, 11 Tex., 572; *Coolidge v. Ruggles*, 15 Mass., 387.

MORTGAGES.—The same rule should apply to mortgages, especially where, as in this case, no note, bond, or other contemporaneous writing accompanies the mortgage. The definitions of a mortgage in the following citations indicate that the time for payment thereof must be fixed and certain. Fisher, Mortgages, 2; *Montgomery v. Bruere*, 4 N. J. Law, 295; 1 Jones, Mortgages [5th ed.], section 75.

L. M. Pemberton, contra.

DUFFIE, C.

March 3, 1881, the congress of the United States provided for the sale of the Indian reservation in Gage county. The land was appraised at \$5 per acre. At the sale the appellee bid in a quarter section of this land at \$13.50 per acre, being \$8.50 more than the appraised value thereof. He paid one-fourth of the purchase price of said land, receiving a certificate from the receiver of the United States

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land office showing his purchase, and the payment of twenty-five per cent. of the purchase price. He took possession of the land, living on and improving the same until February 13, 1891, when he sold the south half of said quarter section to the appellants. At this time he had only paid twenty-five per cent. of the amount for which the land was sold, and the appellants took a deed to the eighty acres sold to them subject to the payment of the amount then due the United States for principal and interest, which was fixed upon by the parties as the sum of \$1,108.64. This sum the appellants assumed and agreed to pay to the United States as a part of the purchase price of said land. It will be noticed that the appellee purchased the land from the United States in 1883 and that he sold the eighty acres to the appellants in 1891. Between the date of his purchase and sale of the land an effort had been made by the several purchasers of the Otoe reservation to procure from the United States a rebate on the amount at which they had bid in the land, reducing said amount to the appraised value thereof. In other words, the claim was made that the United States was entitled to demand and receive from the purchasers the appraised value of the land and not the amount at which it was sold at the sale. This claim was being pressed at the time the appellee sold the land to the appellants and as one of the conditions of the sale it was agreed between the parties that if the United States should grant the rebate demanded by the purchasers, or any part thereof, the appellee should be entitled to one-half the amount of said rebate and the appellants should be entitled to the other half, a mortgage to this effect being made upon the land in favor of appellee. Some time before the final purchase price was paid to the government, the congress of the United States enacted a statute allowing the rebate to the purchasers of these lands, which amounted in the case of the land under consideration to \$....., and an action was brought by the appellee to foreclose the mortgage and recover from the appellants one-half of this amount. The

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district court awarded judgment for the amount claimed and from this judgment the appellants have taken an appeal to this court.

From the above statement it will be observed that the appellee was the owner of certain lands for which he had bid a certain amount. At the time of the sale to the appellants a claim was being made and pressed against the general government for a rebate of the purchase price from the amount bid on said land to the amount at which the land was appraised. In the contract of sale it was agreed that if said rebate or any part thereof was allowed by the government of the United States that each party to the contract should be entitled to one-half of said rebate. We discover nothing unreasonable or unfair in such contract. The claim made by the appellants that the contract is void for the reason that no time of payment is fixed cannot be supported. The time of payment contemplated by the parties was at or before the final payment for the land should be made to the United States government.

The condition of the contract is that "William T. Day and Sarah Day agree to pay to said James I. Gumaer one-half of the amount so remitted whether the amount is more or less than the above described sum; but in case the said government refuses to remit any portion of said purchase price and said William T. Day and Sarah Day, their heirs and assigns, are compelled to pay the whole of the original purchase price and interest still remaining unpaid, then and in that case this mortgage shall be void and of no effect and nothing whatever shall be due thereon."

The undoubted intent of the parties was to allow to the appellee one-half the amount that should be remitted by the government from the purchase price bid for said land. It is true that the time of payment was indefinite. It was when the government should remit any amount from the purchase price. Had the intention of the parties been to fix a different date the language would have been different.

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In such case the agreement would have been to pay to the appellee one-half the amount which the government should ultimately refund to the holder of the title to the land. By using the word "remit" the parties evidently intended to fix the time of payment at or before the time of final payment of the purchase price. In other words, the contract to divide the amount remitted by the government was confined to a date at or prior to the date on which the last payment to the government should be demanded, which was a date which must at some time accrue in the future. We think that the contract was not void from uncertainty and that the decree of the district court should be affirmed.

ALBERT and AMES, CC., concur.

AFFIRMED.

WENCEL A. KITZBERGER V. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

FILED MARCH 4, 1903. No. 12,688.

Commissioner's opinion. Department No. 1.

1. **Negligence:** INSTRUCTIONS AS TO DEGREE: EVIDENCE SUPPORTS FINDINGS: APPEAL AND ERROR. While no degrees of negligence are recognized in this state and the use in instructing a jury of the word "slight" to characterize either negligence or contributory negligence is not approved, where the finding of the jury is amply supported by evidence, a judgment will not be reversed on account of such use of the word.
2. **Railroads:** OPERATION: DAMAGES: KNOWLEDGE OF DANGER BY INJURED. A trackman on a railroad, whose opportunities to observe any of the dangers incident to his employment are as good as are those of his foreman, is not at liberty to rely upon the foreman entirely for his safety. He should call attention to dangers observed by him.

ERROR from the district court for Douglas county.
Tried below before KEYSOR, J. *Affirmed.*

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E. T. Farnsworth and *J. L. Kaley*, for plaintiff in error.

The court erred in refusing to give the instruction copied in full in the opinion herein, relating to the negligence of the company through its foreman. *Chicago, St. P., M. & O. R. Co. v. Lundstrom*, 16 Neb., 254; *Burlington & M. R. R. Co. v. Crockett*, 19 Neb., at page 145; *Sioux City & P. R. Co. v. Smith*, 22 Neb., 775; *Crystal Ice Co. v. Sherlock*, 37 Neb., at page 21; *Union P. R. Co. v. Erickson*, 41 Neb., 1; *Omaha & R. V. R. Co. v. Krayenbuhl*, 48 Neb., 553.

M. A. Low, *W. F. Evans* and *Woolworth & McHugh*, contra.

The work of a section man, in its nature and character, is such that he necessarily assumes risks from passing trains properly operated. So, as a matter of law, any risk in connection with the passage of this train, was one of the ordinary risks of the employment into which the plaintiff entered and the company is not liable. *International & G. N. R. Co. v. Arias*, 30 S. W. Rep. [Tex.], 446; *Larson v. St. Paul, M. & M. R. Co.*, 45 N. W. Rep. [Minn.], 722; *Olson v. St. Paul, M. & M. R. Co.*, 35 N. W. Rep. [Minn.], 866; *Railway Co. v. Leach*, 41 Ohio St., 388; *McGrath v. New York & N. E. R. Co.*, 18 Am. & Eng. R. Cases, 5; *Pennsylvania R. Co. v. Wachter*, 60 Md., 395; *International & G. R. Co. v. Hester*, 21 Am. & Eng. R. Cases, 537; *Hughes v. Winona & St. P. R. Co.*, 27 Minn., at page 140; 3 Elliott, Railroads, page 2048, section 1298.

HASTINGS, C.

Plaintiff in this case commenced his action in the district court for Douglas county against the defendant company, asking judgment in the sum of \$1,995 for an injury received by falling in a jump from a hand-car while working as a trackman or section laborer on defendant's road. He alleges that on January 23, 1900, the defendant's foreman ordered him and four other section men to take a

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hand-car at Albright and start southwestward to a place of work about three miles from Albright; while proceeding under the direction of the foreman and after they had gone about two miles the noise of an approaching freight train, which was coming on its regular schedule time, was heard behind through a deep cut and around a curve along which the hand-car was proceeding; that plaintiff and the other men were at once ordered to remove the hand-car from the track; that the freight train was coming about thirty miles an hour and close behind; that the brakes were applied to the hand-car, but the tracks were frosty and slippery and the brakes would not control it, and the wheels slipped for a long distance on the tracks; that there was no sand upon the hand-car for the purpose of placing upon the track and the hand-car was in imminent danger of being run down by the freight train; that plaintiff was on the rear end of the hand-car and after using all efforts to stop it, fearing that it would be overtaken, and knowing that his life was in danger, without fault or negligence, he stepped back upon the ground, and in so doing fell and broke his left wrist; that immediately after the plaintiff stepped off, the freight train came up and the other men had barely time to remove the hand-car from the track. He says that the hand-car was defective, unsafe for use and had no proper brake; that it was negligence on the part of the foreman to start the hand-car ahead of the freight train knowing that by its schedule time the latter would immediately overtake the hand-car; that the company was negligent in using the car without a proper brake and without sand or appliances for stopping it, and negligent in not, through its foreman, stopping the hand-car much sooner and while the freight train was at a safe distance.

The defendant admitted the receiving of an injury by plaintiff, but denied that it was the result of any carelessness or negligence of its foreman, but alleged that the injury was caused by plaintiff's own carelessness and negligence; that the character and condition of the hand-

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car, and of the tracks and the schedule time of the freight train, were all known to the plaintiff and he assumed all the dangers and risks incident thereto and negligently and carelessly alighted from the car while the same was in motion and thereby received the injury. This answer was denied. The jury returned a verdict for the defendant. Motion for a new trial was filed and from the judgment rendered on the verdict the plaintiff brings error. The errors complained of relate wholly to instructions given and refused by the trial court.

The complaint as to the instructions given is of No. 1, which contained this statement: "Contributory negligence is any degree of carelessness, however slight, on the part of a person injured which co-operates in producing the injury complained of"; and of No. 3, that if the jury found that defendant's negligence was the direct cause of plaintiff's injury they should return a verdict for the plaintiff "unless you further find from a preponderance of the evidence that plaintiff was guilty of a want of care of some degree, however slight, which contributed to the happening of the accident in question." The "however slight" in these two instructions is claimed to be error calling for a reversal of the case. It would hardly seem so. The jury were fully and carefully instructed in several places that whoever charges carelessness and contributory negligence must establish it by a preponderance of the evidence. They were also told what would constitute negligence in the act of jumping off. While a large number of cases are cited from this court discountenancing the use of the term "slight" in negligence cases, it is not claimed, and could not be, that the instructions, taken as a whole, did not fully and distinctly apprise the jury that contributory negligence, which would serve to defeat the plaintiff's claim, must be such as would aid in causing the injury complained of. The evidence seems to us hardly sufficient to establish negligence on the part of the defendant, and it seems ample to sustain a finding that the act of plaintiff in stepping off the car was not in the exercise of

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due caution on his part. The plaintiff himself swears that he was not unaccustomed to stepping back from the car while it was in motion. Another workman stepped off at the same time and was not injured, and, as plaintiff says, laughed at the latter for his fall. Plaintiff fell between the rails striking one wrist across the rail at that side, and so fracturing it; he then arose, followed on, still between the rails, to the hand-car, which had stopped in two rails' length, and helped to lift off the hand-car, which was safely out of the way when the train passed. While we do not wish to modify anything which is said in *Village of Culbertson v. Holliday*, 50 Neb., 229, or in *Missouri P. R. Co. v. Fox*, 56 Neb., at page, 749, or in *City of Friend v. Burleigh*, 53 Neb., at page 680, or in *Omaha Street R. Co. v. Craig*, 39 Neb., 601, as to degrees of negligence, and the use of the term "slight" in defining or describing negligence or contributory negligence, we do not think the verdict of this jury should be disturbed because of these two instructions.

The other error complained of is the refusal of the following instruction:

"You are instructed that if you find from the evidence that the section foreman, Logan, had power and authority to hire and discharge the section hands, including the plaintiff, and that said Logan had charge, control and direction over said section hands at the time of the injury complained of, that by the terms of their hiring or agreement said section men were bound to obey the orders of said Logan, and that at the time and under the circumstances it was attended with unusual and peculiar hazard to proceed to ride to the place of work on said hand-car ahead of said freight train without stopping said car in time for said train to pass it on account of the approaching train, that Logan knew and had time, the power and authority and ability, to notify said men and warn them of the near approach of said train, that said section men relied upon said Logan to give said notice and warning, and that he failed to stop said car in time for the men thereon

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to alight with safety, and that in consequence thereof the plaintiff met with the injury complained of, then in that case you are instructed that this was negligence for which the defendant company was responsible."

It was not error to refuse to give this instruction. It involves a number of elements which do not appear in the present case. There is nothing to show that the section men were relying upon their foreman. The train is alleged to have been on schedule time. Plaintiff says that as they were leaving Albright on the hand-car they saw the train coming in. He also says its whistle was heard. There seems nothing to warrant an instruction authorizing a verdict on the basis that the situation of the section men was one of unusual peril. The passage of trains on their regular time is a constant incident of a trackman's employment.

This refused instruction is taken substantially from the case of *Chicago, St. P., M. & O. R. Co. v. Lundstrom*, 16 Neb., 254. In that case men employed on a construction train were sent by their conductor to widen a passage through snow in a deep cut where they could not climb out. While there they were struck by a passing train of whose coming the conductor entirely failed to warn them. Such failure was held negligence on the part of the construction train conductor and he was held to be a vice-principal for whose acts and negligence the company was liable. The men were under his orders. They were sent by him where they could not look out for their own safety and he neglected the commonest precaution to warn them. It was the man's duty to obey the conductor's orders unless "their execution would carry him into palpable danger," says the opinion. In the present case, whatever danger there was could be seen as plainly by plaintiff as by the foreman. He made no objection to starting with the hand-car, nor to remaining on the track with it till the brakes were applied. If there was danger, it was, as plaintiff's testimony shows, audible and visible, if not "palpable." It was not error to refuse this instruction under the evidence in this case.

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It is recommended that the judgment of the district court be affirmed.

KIRKPATRICK and LOBINGIER, CC., concur.

AFFIRMED.

THE NEBRASKA LOAN & TRUST COMPANY, APPELLANT, V.
ORSON S. HASKELL ET AL., APPELLEES.

FILED MARCH 4, 1903. No. 12,704.

Commissioner's opinion. Department No. 2.

1. **Mortgages: FORECLOSURE: FOR PART OF DEBT: EFFECT ON LIEN.** If a mortgage is foreclosed as to a portion of the debt secured, all being due, and all the mortgaged property is sold, third persons are justified in believing that the remainder has been paid, and the lien of the mortgage is terminated as to creditors and purchasers holding under the foreclosure sale.
2. **Mortgages: FORECLOSURE: FOR PART OF DEBT: REDEMPTION: EFFECT ON LIEN.** But if, on foreclosure as to a portion or an installment, the mortgagor redeems before sale under the decree, it is as if there had been no foreclosure, and foreclosure may be had and the land may be sold, subsequently, for satisfaction of the other installments.
3. **Mortgages: FORECLOSURE: FOR PART OF DEBT: IRREGULARITIES: CORRECTION.** Error or irregularity in foreclosing a mortgage as to interest coupons only, subject to the principal note, the record showing that the principal note was held by the plaintiff and was due, can be availed of only in direct proceedings for that purpose.
4. **Mortgages: FORECLOSURE: REDEMPTION: REPUDIATION OF PART OF DECREE.** A party to a decree of foreclosure who redeems therefrom will not be permitted to claim under one portion of the decree and repudiate the remainder.
5. **Mortgages: FORECLOSURE: FOR PART OF DEBT: SUBJECT TO BALANCE: REDEMPTION: ESTOPPEL TO COMPLAIN OF IRREGULARITY IN DECREE.** Hence where a decree foreclosing a mortgage as to certain coupon notes expressly provided that the amount due on said coupon notes was a lien subject to the amount of the principal note, then due, which was a first lien, and ordered a sale subject to the first lien of such principal note, and the mortgagor redeemed before sale, neither he nor a subsequent purchaser of his interest may question the regularity of the provision in the decree thereafter nor assert that the decree operated to extinguish the entire lien.

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APPEAL from the district court for Valley county. Tried below before THOMPSON, J. *Reversed with directions.*

R. L. Staple and Jno. M. Ragan, for appellant.

Hall & Johnson, M. B. Reese and H. A. Reese, contra.

POUND, C.

Haskell, one of the appellees, hereinafter styled the mortgagor, executed and delivered to the appellant, hereinafter styled the mortgagee, two mortgages upon the land in controversy, one to secure a principal note and ten coupon notes for installments of interest, and one to secure ten notes for installments of the remainder of the interest rate agreed on which were to cover the commissions of the mortgagee. After maturity of the principal note five of the interest coupons and five of the commission notes remaining unpaid, the mortgagee, which owned and held all the notes, brought a suit to foreclose the mortgages as to the interest coupons and commission notes only. It alleged in its petition that it owned the principal note, that the principal note was past due, and that it did not desire to foreclose said mortgages as to said note, but only as to said coupons. It prayed that the mortgage securing the commission notes be foreclosed and that the first mortgage securing the principal note and interest coupons be foreclosed as to the interest coupons only, subject to the principal note and interest thereon from its maturity. Personal service having been had and the court having acquired jurisdiction, a decree was rendered as prayed for, finding the amount due on the commission notes and interest coupons, finding such amount a lien on the property subject to the amount due on the principal note, which was decreed to be a first lien, and ordering the property sold for satisfaction of the amount due on said coupons, subject to the first lien of said principal note and the mortgage so far as it secured the same. A stay was taken, and afterwards, be-

fore sale, the mortgagor paid the amount of the decree and redeemed therefrom. Subsequently he sold his interest to the appellees Munn and Hall. The present suit was brought to foreclose the first mortgage for satisfaction of the amount due on the principal note. Munn and Hall answered, setting up the facts as to the first foreclosure and claiming that the lien of the mortgage was extinguished thereby. The district court took this view, and dismissed the suit.

The case is not within the purview of sections 856 to 861, Code of Civil Procedure, since the whole indebtedness secured by the mortgage was due and was held by the mortgagee at the date of the first foreclosure. In cases not covered by those sections, we may concede that if a mortgage is foreclosed as to a portion of the debt secured, all being due, and all the mortgaged property is sold, third persons are justified in believing that the remainder has been paid, and the lien of the mortgage is terminated as to creditors and purchasers under the foreclosure sale. *Rains v. Mann*, 68 Ill., 264; *Anderson v. Anderson*, 129 Ind., 573, 29 N. E. Rep., 35; *Escher v. Simmons*, 54 Ia., 269, 6 N. W. Rep., 274; *Bufford v. Smith*, 7 Mo., 489; *Vieno v. Gibson*, 20 S. W. Rep. [Tex.], 717. But it is equally true that if on foreclosure as to a portion or an installment the mortgagor redeems before sale under the decree, it is as if there had been no foreclosure, and foreclosure may be had and the land may be sold, subsequently, for satisfaction of the other installments. *Standish v. Vosberg*, 27 Minn., 175; *Dupree v. Salt Lake Valley Loan & Trust Co.*, 57 Pac. Rep. [Utah], 845; 2 Jones, Mortgages [5th ed.], section 1459. Hence appellees must rely upon the technical rule as to splitting causes of action. This court has said that "a party thereto seeking to enforce a claim, legal or equitable, must present to the court all the grounds upon which he expects judgment in his favor. He can not divide his demand and prosecute by different actions." *Richardson v. Opelt*, 60 Neb., 180. But the court added that this rule does not require causes of action,

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each of which by itself would authorize independent relief, to be prosecuted in one suit, even if such course might be taken. *Richardson v. Opelt, supra; Beck v. Devereaux*, 9 Neb., 109. The strict rules of the common law as to what is a separate cause of action can not be applied in all respects to suits in equity. It is possible that all matters which might be set up in a bill under the old practice without making it multifarious may be set up in a petition under the Code without rendering it open to a motion to separately state and number. In that sense there would be but one cause of action. Yet these matters might be such that a number of independent suits could be maintained if the plaintiff preferred. Where a mortgage secures several notes falling due at different times, it has been held that there are in effect as many mortgages as there are notes, and that there may be as many foreclosures. *Crouse v. Holman*, 19 Ind., 30; see *Nares v. Bell*, 66 Neb., 606, 92 N. W. Rep., 571. We need not decide these questions, however, as the appellees are in no position to raise them.

The first foreclosure was certainly an extraordinary proceeding. But error or irregularity in foreclosing a mortgage as to interest coupons only, subject to the principal note, the record showing that the principal note was held by the plaintiff and was due, can be availed of only in direct proceedings for that purpose. *Pretzfeld v. Lawrence*, 34 Misc. [N. Y.], 329, 69 N. Y. Supp., 807. Moreover a party to a decree of foreclosure who redeems therefrom will not be permitted to claim under one portion of the decree and repudiate the remainder. *Dupce v. Salt Lake Valley Loan & Trust Co., supra*. The decree expressly provided that the amount found due did not satisfy the lien of the mortgage, but that there was another claim, upon the principal note, for which it stood as security, and that such claim was a first and prior lien. It expressly directed that the sale should be subject to the lien of the mortgage as security for said principal note. If the mortgagee desired to claim that the foreclosure cut

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off the whole lien, and that by satisfying the decree and paying the amount found due therein he could extinguish the entire mortgage, he should have appealed and obtained a modification of the decree. When he acquiesced in the decree and redeemed therefrom he redeemed under the terms of the decree, which provided that there was an outstanding first lien for the amount of the principal note. Thereafter he was in no position to ignore the express provisions of the decree and assert a complete extinguishment of the lien. The purchasers of his interest are in no better position. There is no pretense that they are purchasers without notice or in any way entitled to protection on equitable grounds.

We recommend that the decree be reversed and the cause remanded with directions to enter a decree of foreclosure.

BARNES and OLDHAM, CC., concur.

The judgment of the district court is reversed, and the cause remanded with directions to enter a judgment of foreclosure.

REVERSED WITH DIRECTIONS.

NEBRASKA LOAN AND TRUST COMPANY, APPELLANT, v.
OLIVER DOMON ET AL., APPELLEES.

FILED MARCH 4, 1903. No. 12,705.

Commissioner's opinion. Department No. 2.

1. **Mortgages: FORECLOSURE: FOR PART OF DEBT: EFFECT ON LIEN.** The foreclosure of a mortgage for the interest only on the principal debt secured thereby, where the whole debt, both principal and interest, is due and payable at the time of such foreclosure, ordinarily exhausts the lien of the mortgage, and is a bar to a second foreclosure suit.
2. **Mortgages: FORECLOSURE: FOR PART OF DEBT: SUBJECT TO BALANCE: DECREE AS BAR TO SECOND FORECLOSURE: ESTOPPEL.** But where the decree in such former suit specifically provides that it is subject to

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the mortgage lien for the principal debt, and that the sale shall be made subject thereto as a first lien, the parties to the record are estopped to plead the decree as a bar to a second foreclosure to obtain the payment of said principal sum.

3. **Mortgages: FORECLOSURE: DECREE IN REM: ESTOPPEL OF PARTY IN SUBSEQUENT ACTION.** After a judgment or decree *in rem* a party to the record, who is duly served with process and appears personally therein, is estopped from asserting any claim or defense contrary to the terms of the decree.

APPEAL from the district court for Valley county. Tried below before THOMPSON, J. *Reversed with directions.*

R. L. Staple and John M. Ragan, for appellant.

George W. Hall and Victor O. Johnson, contra.

BARNES, C.

On March 1, 1893, Oliver Domon borrowed \$1,000 of the Nebraska Loan & Trust Company, and evidenced the debt by his bond, or coupon interest-bearing note, for \$1,000, payable to the trust company or order, March 1, 1898, with interest at 10 per cent. after maturity. The principal note was to draw interest at the rate of 8 per cent. per annum from date until maturity, of which $5\frac{1}{2}$ per cent. was evidenced by ten coupon interest notes for \$27.50 each, which were attached to the principal note or bond; the other $2\frac{1}{2}$ per cent. was evidenced by ten separate notes of \$12.50 each, also payable to the trust company. The payment of the principal note and coupons was secured by a first mortgage given by Domon and wife to the trust company on the south half of the northeast quarter and the east half of the southeast quarter of section 34, in township 17 north of range 13 west of the 6th P. M., situated in Valley county, Nebraska, and the other interest notes were secured by a second mortgage on the same premises. Default was made in the payment of the interest notes, and a suit to foreclose both mortgages was commenced in the district court of said county. When the action was commenced the principal note for \$1,000 and the last one of

the coupon interest notes attached thereto were not yet due. Personal service of summons was had on all of the defendants, who appeared, and the cause was continued by agreement.

The original petition contained the following allegation:

"4th. The plaintiff's principal bond of \$1,000 will not mature until the 1st day of March, 1898, and plaintiff does not desire to foreclose the same at the present time, but desires that whatever decrees shall be rendered in this case shall be rendered subject to its lien of \$1,000 due March 1, 1898, together with interest thereon at the rate of 5½ per cent. per annum from the 1st day of September, 1897, payable semi-annually."

Afterwards the parties all signed a stipulation by which it was agreed that the plaintiff should file an amended petition and the defendants should have a certain time thereafter to answer the same. After the principal sum of \$1,000, and the last interest coupon note became due, the amended petition was filed, which contained the same allegations set forth in the original petition, except the following:

"6th. That plaintiff's principal note of \$1,000 aforesaid matured March 1, 1898, and there is now due thereon, from the defendant Oliver Domon, to the plaintiff the sum of \$1,000 with interest thereon at the rate of ten per cent. per annum from the 1st day of March, 1898, but plaintiff does not desire to foreclose the same at the present time, but desires that whatever decrees shall be rendered in this case shall be rendered subject to its lien thereunder, with interest as aforesaid."

By the amended petition plaintiff, among other things, prayed:

"2d. That it be decreed that plaintiff's lien under its said mortgage is prior and superior to the lien or interest of either of the defendants, in or to said premises, and subject only to plaintiff's lien of \$1,000 with interest from March 1, 1898, at 10 per cent. per annum."

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A decree of foreclosure was rendered by the court in said cause on the 11th day of December, 1899, in which there was the following finding:

"8th. That the plaintiff has a first mortgage lien upon all of the above described real estate to secure the payment of the sum of \$1,000 together with interest thereon at the rate of 5½ per cent. per annum payable semi-annually from the 1st day of September, 1897, which said mortgage lien matured on the 1st day of March, 1898, and that the findings and decree herein rendered are subject to said mortgage lien and interest."

In the findings, among which was the foregoing, the court further found that there was due the plaintiff the sum of \$432.03, and ordered the property sold to satisfy that sum with costs of suit, and further ordered as follows: "Such sale shall be made subject to the mortgage lien of the said plaintiff for the sum of \$1,000 due on the 1st day of March, 1898, together with interest thereon at the rate of 5½ per cent. per annum payable semi-annually from the 1st day of September, 1897, until maturity, and 10 per cent. from maturity until paid."

The defendants filed a request for a stay of order of sale and secured the same, and at the expiration of the stay they paid the amount of the decree and costs into court. Thereafter they failed to pay the principal sum of \$1,000 secured by the first mortgage, and on the 8th day of May, 1900, the loan company commenced this action to foreclose the said mortgage as to the said principal sum due thereon. The defendants answered the petition setting up the former decree of foreclosure as a bar to the maintenance of this suit. On the trial the court found for the defendants and rendered a judgment in their favor dismissing plaintiff's action, from which judgment the cause comes to this court by appeal.

The appellant contends that the court erred in holding that the former foreclosure of its mortgage for a part of the amount then due thereon was a bar to the present suit. While appellees claim that at the time the decree was

rendered in the former suit the cause of action on the mortgage in question had fully accrued; that the whole amount of the debt secured thereby was due and payable to the appellant; that the cause of action was one and indivisible, and could not be split so as to maintain two foreclosure suits thereon; that the former decree of foreclosure exhausted the lien of the mortgage, and is a bar to the maintenance of this suit. Ordinarily the contention of the appellees would prevail. In *Johnson v. Payne*, 11 Neb., 269, it was held that "Whatever amount is due under the mortgage at the time of foreclosure, including taxes so paid, constitutes but a single and indivisible demand, and can not be separated and collected by several actions." The same rule was announced in *Haines v. Flinn*, 26 Neb., 380. In fact the general rule is, that where by the terms of a mortgage the whole amount of principal and interest is due, a foreclosure for a part thereof exhausts the lien of the mortgage. *Hanson v. Dunton*, 28 N. W. Rep. [Minn.], 221; *Escher v. Simmons*, 6 N. W. Rep. [Ia.], 274; *Walton v. Hollywood*, 11 N. W. Rep. [Mich.], 209; *Poweshick County v. Dennison*, 36 Ia., 244; *Minor v. Hill*, 58 Ind., 176. But this case presents a somewhat different question. It will be observed that the appellant in both his original and amended petition in the former foreclosure suit asked to be allowed to except the principal sum due on the mortgage from the decree, and prayed for a foreclosure for the interest then due amounting to the sum of \$432.03, and that such decree be subject to the lien of the principal sum of \$1,000, for which this foreclosure suit is brought. The appellees personally appeared in that suit and made no objections to the allegations of the petition or its prayer. The court thereupon rendered a decree which, in effect, preserves the mortgage lien as to the \$1,000, the principal sum, although it was due at that time. No objections were made to the decree, no appeal was taken therefrom, and no proceedings were instituted to reverse or modify it in any respect. The appellees filed their request for a stay, thus acknowledging

the validity of the decree and agreeing to its terms. It follows that both parties are bound thereby, and the appellees are estopped by the recitals of that decree from pleading it in bar to the prosecution of this suit.

After a judgment or decree *in rem* a party to the record is estopped from asserting any claim contrary to the facts determined thereby, or the orders made therein. *Rector v. Rotton*, 3 Neb., 171; *McHugh v. Smiley*, 17 Neb., 620, 20 N. W. Rep., 296; *Spiteley v. Frost*, 15 Fed. Rep., 304; *South Omaha Lumber Co. v. Central Investment Co.*, 32 Neb., 529, 49 N. W. Rep., 429.

It may be conceded that the decree was erroneous, and that if proceedings had been taken to reverse or modify it in any manner, such proceedings would have been sustained. But it can not be said that the decree was void. The court had jurisdiction of the subject-matter and the parties to that suit, and its decree, even if erroneous, is binding alike upon all of them. In the application of the principle of *res judicata* there is no difference between courts of law and courts of equity. When an issue of fact or of law has been adjudicated upon the merits in either tribunal it can not be again litigated in another. 2 Black, Judgments [2d ed.], section 518. A decree of a court of equity, whenever the parties to a suit and the subject of the controversy between them are within its jurisdiction, is as binding as would be the judgment of a court of law upon the parties and their interests regularly within its cognizance. 2 Black, Judgments [2d ed.], section 517. By the terms of the decree, it was made subject to the lien of the \$1,000 mortgage which is sought to be foreclosed in this action. Its effect was to preserve the lien of the mortgage and authorize its subsequent foreclosure. The matter was thus taken out of the general rule above mentioned. It follows that the court erred in finding that the former foreclosure was a bar to the prosecution of this suit and in dismissing the appellant's cause of action. In any event, under the facts in this case as disclosed by the record, the appellant was entitled to a foreclosure of its mortgage for the balance due thereon.

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We therefore recommend that the decree of the district court be reversed, and the cause remanded with instructions to the district court to render a decree of foreclosure as prayed for in the appellant's petition.

OLDHAM and POUND, CC., concur.

The decree of the district court is reversed and the cause remanded with directions to the district court to enter a decree of foreclosure in favor of the appellant.

REVERSED WITH DIRECTIONS.

HENRY L. ALBERS, APPELLEE, V. JOHN T. DILLAVOU, APPELLANT, IMPEADED WITH CHARLES HILL, APPELLEE.

FILED MARCH 4, 1903. No. 12,713.

Commissioner's opinion. Department No. 2.

Costs: RETAXING: DISCRETION OF COURT: SCOPE: STATUTES. In the matter of taxing costs "the discretion conferred on the courts by section 623 of the Code is not an arbitrary, but a legal, one, to be exercised within the limits of legal and equitable principles." *Wallace v. Sheldon*, 56 Neb., 55, 76 N. W. Rep., 418, followed and approved.

APPEAL from the district court for Clay county. Tried below before STUBBS, J. *Reversed with directions.*

Wm. M. Clark, for appellant.

Thomas H. Matters, contra.

OLDHAM, C.

This was a suit in which the plaintiff in the court below asked for and was awarded a permanent injunction restraining the defendant Hill, one of the road overseers of Clay county, Nebraska, and defendant Dillavou, the owner of lands adjoining the road, from conveying the

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surface water from the road and Dillavou's land on to the lands of plaintiff by means of a ditch. The road overseer and defendant Dillavou each answered separately. The court found the issues in favor of the plaintiff and found that the ditch was constructed by each of the defendants. No complaint is made of the findings of the court so far as the injunction is concerned.

Defendant Hill filed a motion to have the costs of the case retaxed and assessed either to the road district, the township, the defendant, or to the plaintiff. Defendant Dillavou likewise moved to have the costs retaxed and assessed to the road district, the township, or to the plaintiff. The court sustained the motion of defendant Hill, and taxed all the costs to his codefendant, Dillavou. Dillavou's motion to retax was overruled and he brings the case here complaining only of the order of the district court in taxing the entire costs of the proceeding to him.

We have examined the pleadings in the case as well as the findings of fact, and are satisfied that it is inequitable to place the entire burden of the costs of this suit upon defendant Dillavou. Each of the defendants answered separately and for himself; each acted in the commission of the tort independently of the other; and each added his portion to the costs of the suit. Under these conditions it would seem that in bearing the burdens of the litigation so far as the court costs and witness fees are concerned, "equality is equity." In the matter of taxing costs "the discretion conferred on the courts by section 623 of the Code is not an arbitrary, but a legal, one, to be exercised within the limits of legal and equitable principles." *Wallace v. Sheldon*, 56 Neb., 55, 76 N. W. Rep., 418.

It is therefore recommended that the judgment of the district court be reversed and the cause remanded with directions to tax defendant Dillavou with his own costs and one-half of plaintiff's costs only.

BARNES and POUND, CC., concur.

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The judgment of the district court is reversed and the cause remanded with directions to tax defendant Dillavou with his own costs and one-half of plaintiff's costs only.

REVERSED WITH DIRECTIONS.

F. W. WHITING v. ANNA E. CARPENTER.

FILED MARCH 4, 1903. No. 12,720.

Commissioner's opinion. Department No. 1.

1. **Trial: VERDICT: OBJECTIONS, WHEN MADE.** Objections relating merely to the form of a verdict must be made at the time of its rendition.
2. **Libel and Slander: INSTRUCTIONS APPROVED.** Instructions in an action for slander examined and approved.
3. **Libel and Slander: INTENT.** It is not necessary in such an action to show that the words complained of were uttered with the intent to injure and defame plaintiff.
4. **Damages: PUNITIVE: FAILURE TO CAUTION JURY AGAINST: LIBEL AND SLANDER.** Failure to caution the jury against punitive damages is not error where the court has instructed them to allow such damages as "under all evidence would be a just compensation for the injury."

ERROR from the district court for Kearney county.
Tried below before ADAMS, J. *Affirmed.*

Dailey & Paulson, for plaintiff in error.

A. J. Shafer, Hague & Anderbery and *Stewart & Munger*, contra.

LOBINGIER, C.

Defendant in error sued plaintiff in error in the district court for Kearney county for slander and obtained a judgment for \$475. The petition set forth two causes of action: (1) That defendant in error stated to one Harris that "Miss Anna E. Carpenter (meaning the plaintiff) is

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a whore"; and (2) that he also stated to one Landis that "‘she,’ meaning Anna E. Carpenter, the plaintiff herein, ‘is a prostitute’ and that ‘she’ meaning the plaintiff, ‘had committed an abortion.’" The amended answer on which the case was tried averred as to the second cause of action "that the allegations contained therein are true," and as to the first cause of action that plaintiff in error was at the time mentioned in the petition sick and at times delirious, and that if he made the statements alleged in the petition he was delirious at the time. The answer also contained a general denial.

The first error complained of is as to the form of the verdict, which it is objected failed to contain a finding as to each cause of action separately. The only attempt to assign this objection, either in motion for a new trial or petition in error, is the averment that "the verdict is contrary to law," and it is more than doubtful if this is sufficient. But in any event the verdict is in the usual form, and as no objection was made at the time of its rendition, plaintiff in error can not now be heard to complain. *Roggenkamp v. Hargreaves*, 39 Neb., 540; *Cervena v. Thurston*, 59 Neb., at page 344; *Brumback v. German National Bank*, 46 Neb., 540; *Yankton, N. & S. R. Co. v. State*, 49 Neb., at page 274.

The complaints chiefly relied upon relate, however, to the instructions. In one of these the court set forth certain provisions of the Code relative to actions for libel and slander, and it is urged that the jury should have been instructed as to the distinction between these two. In other portions of the charge, however, the jury were instructed as to the essentials to recovery in slander cases, and we do not think that the court was required to explain the difference between these and actions for libel. The jurors were expressly authorized to take with them to their deliberations the petition, which alleged merely the uttering of oral statements, and we can not think that they could have been misled into the belief that any part of the law of libel, not also applicable to slander, should govern the case before them.

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It is claimed that the jury should have been instructed that "the language must have been uttered by the defendant with the intent to injure and defame the character of the plaintiff." This would have been a misstatement of the law.

"The intention or motive with which the words were employed is as a rule immaterial. If the defendant has in fact injured the plaintiff's reputation, he is liable, although he did not intend so to do, and had no such purpose in his mind when he spoke or wrote the words." Bigelow's *Odgers, Libel and Slander* [Am. ed.], page 5*.

"There is a conclusive presumption of malice from falsely speaking words actionable in themselves, unless a legal justification or excuse is shown. The malicious intent of a slander or libel is not a question of fact; it is a conclusion of law; being so, the plaintiff is not required to prove it, except by showing the publication of the defamatory matter; nor can the defendant deny or disprove it as a separate element of wrong." 3 Sutherland, *Damages*, pages 650, 651.

The charges here made were actionable without showing special damage. Besides imputing crimes (Criminal Code, sections 242, 246), they were such as have been frequently held by this court to be slanderous *per se*. *Hendrickson v. Sullivan*, 28 Neb., 329; *Barr v. Birkner*, 44 Neb., 197; *Herzog v. Campbell*, 47 Neb., 370.

In charging the jury as to the measure of damages, the court told them that they should consider *inter alia* the social standing of the plaintiff, and it is objected that the record contains no evidence as to what this was. Several witnesses testified, however, that defendant in error's reputation in the community was good. It was shown also that she had been a school teacher for a number of years, and even the answer alleges that "she taught a class in Sunday school in the Presbyterian church of Axtell," and that she had been "assuming a station and position in society to which she was not entitled by reason of her conduct." This, it seems to us, afforded a sufficient basis

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for the instruction. "The plaintiff (in defamation cases) may prove, in aggravation of damages, his rank and condition in society." 3 Sutherland, Damages, page 653.

Complaint is made of the following charge:

"You are instructed that the law presumes in the absence of evidence to the contrary, that plaintiff possesses a good character and reputation and that she is innocent of the crimes charged and you are instructed that she is entitled to recover in this case, unless the defendant has proven by a preponderance of the evidence all the elements necessary to convict plaintiff of prostitution and abortion. The burden of proof is upon defendant to show the plaintiff guilty of the commission of these crimes."

It is claimed that this must have left with the jury the impression that the burden was on defendant as to the first cause of action which was not expressly admitted, as well as to the second cause of action which was admitted. But the crimes mentioned in this charge were such as are set forth in the second cause alone, and the jury could hardly have been misled in this regard. Moreover, it is literally true, as the instruction states, that defendant in error was entitled to recover on this cause of action unless plaintiff in error established the truth of his charges. She might have been entitled to recover more by establishing also the first cause of action, but her failure to do so would not prevent her from recovering on the second.

It is finally contended that the court erred in refusing the following charge requested by defendant below:

"The jury are instructed that under the laws of this state, damages by way of punishment are never allowed, and if you find from the evidence in this case that the defendant made the disclosures as alleged, and that the same were true as claimed by him, then your verdict should be for the defendant, notwithstanding the fact that defendant treated the plaintiff in a professional manner, if you should so find from the evidence."

It will be noticed that this instruction covers three distinct points: (1) Exclusion of punitive damages; (2)

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truth as justification; and (3) waiver of professional restrictions. This last element is based upon a statement by defendant in error's counsel in open court to the effect that any restriction on plaintiff in error's testimony as based on professional communications under section 333 of the Code was waived and he was invited to tell all he knew of the charges made. It is claimed that by reason of this express waiver and admission, the charge ought to have been given and that the jury must have believed that plaintiff in error was making improper disclosures and that the verdict was induced by this belief rather than by the evidence. But the court had already expressly told the jury that their verdict should be for the defendant below if he showed by a preponderance of the evidence that the charges were true. We do not think it was necessary to state in addition that the truth of the charges might be established by plaintiff in error's own evidence, especially in view of the challenge to him in the presence of the jurors to tell all he knew about the charges. It might have been proper for the court to have given the third element of the charge requested, but we can not think that its refusal was prejudicial.

As to the measure of damages, the jurors were instructed that they should allow such as "under all the evidence would be a just compensation for the injury." Because it failed to add the first element of the request above quoted (*i. e.*, the exclusion of punitive damages) it is claimed that the charge is defective and erroneous. As we have seen, the only damages authorized by the instructions were such as would be strictly compensatory, and it seems clear to us that the jury did not exceed this limit. The jury must have believed defendant in error or it would not have rendered a verdict in her favor at all. Hence, as the damages found were less than might well have been awarded as compensation, the failure of the court to expressly warn the jury against punitive damages was without prejudice to plaintiff in error.

There is some discussion of the evidence, but it is not

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seriously claimed to be insufficient to support the verdict, and it seems to us ample. We recommend that the judgment be affirmed, and if it were for an amount several times as large we would feel constrained to make the same recommendation.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

RUDOLPH B. KUMMER v. THE DUBUQUE TURBINE AND
ROLLER MILLS COMPANY.

FILED MARCH 4, 1903. No. 12,721.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: ISSUES CHANGED ON APPEAL: TRANSCRIPT, WHAT MUST CONTAIN.** Alleged errors by reason of change of issues on appeal from the county court will not be reviewed unless the transcript shows that there was a judgment in and appeal from that court and sets forth the pleadings therein. *Walton v. Campbell*, 51 Neb., 788.
2. **Contracts: CONSTRUCTION: EVIDENCE: CONTEMPORANEOUS PAROL AGREEMENT.** Where a contract to sell machinery and put it in place is in writing and free from ambiguity, evidence as to a prior or contemporaneous parol warranty is inadmissible.

ERROR from the district court for Platte county. Tried below before GRIMISON, J. *Affirmed.*

C. J. Garlow, for plaintiff in error.

McAllister & Cornelius, contra.

POUND, C.

Error is prosecuted from a judgment for the plaintiff in an action for the purchase price of certain mill machinery. The contract was in writing. Defendant claimed a contemporaneous parol warranty as to how long it would take to put the machinery in place and as to the quality of flour it would produce. Upon this basis he pleaded a counter-

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claim, very considerably in excess of the price of the machinery, for failure to comply with the parol warranty and for loss of profits. The trial court excluded the evidence offered on this head, and refused to allow amendments, tendered at the trial, framed upon the same basis. It is claimed that the court erred in allowing plaintiff to make certain amendments at the trial, whereby, it is alleged, the issues were changed from what they had been in the county court, where, we are told, the cause originated; in rejecting the parol evidence offered in support of the defendant's counter-claim, and in denying the defendant leave to amend.

As to the first point, it is enough to say that alleged errors by reason of change of issues on appeal from the county court will not be reviewed unless the transcript shows that there was a judgment in and appeal from that court and sets forth the pleadings therein. *Walton v. Campbell*, 51 Neb., 788.

As to the other errors complained of, notwithstanding the ingenuity with which learned counsel attempts to bring the case within some of the exceptions to the settled rules as to the incompetence of parol evidence to add to or vary a written contract, we think it very clear that the evidence as to the alleged contemporaneous parol warranty was properly rejected. No amount of amendment of the counter-claim could have bettered the defendant's case.

We recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

CHARLES WILSON, APPELLEE, V. MARY NEU, APPELLANT,
ET AL.

FILED MARCH 4, 1903. No. 12,760.

Commissioner's opinion. Department No. 3.

Mortgages: FORECLOSURE: APPRAISAL: SALE.

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APPEAL from the district court for Douglas county.
Tried below before KEYSOR, J. *Affirmed.*

John T. Cathers, for appellant.

C. H. Balliet, contra.

DUFFIE, C.

This is an appeal from an order confirming a sale of real estate made under a decree of foreclosure. Two objections are made to the sale: (1.) That it was made more than sixty days after the issuing of the order of sale to the sheriff. (2.) That no new appraisement was made, the land having been once offered and not sold for want of bidders. Both of these objections are without merit.

Section 495 of our Code of Civil Procedure requires a new appraisement only in cases where the land has been twice offered and not sold for want of bidders. Section 510 of the Code, fixing the time within which an execution shall be made returnable, is not applicable to orders of sale issued on decrees of foreclosure. *Jarrett v. Hoover*, 54 Neb., 65.

We recommend the affirmance of the order appealed from.

ALBERT and AMES, CC., concur.

AFFIRMED.

• EDWIN ALONZO BARNES V. BOSTON INVESTMENT COMPANY.

FILED MARCH 18, 1903. No. 12,392.

Commissioner's opinion. Department No. 3.

1. Attachment: PROCESS: SERVICE BY PUBLICATION: JURISDICTION: SUFFICIENCY OF AFFIDAVIT. An objection that the court has not obtained jurisdiction of the person of the defendant does not present the question of the sufficiency of an affidavit for publication of the summons in an action of attachment.

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2. Attachment: PROCESS: SERVICE BY PUBLICATION: AFFIDAVIT SUFFICIENT. Affidavit for publication of summons against a non-resident defendant examined, and held sufficient.

ERROR from the district court for Butler county. Tried below before SORNBORGER, J. *Affirmed.*

W. S. Summers, for plaintiff in error.

Kirkpatrick & Hager, contra.

DUFFIE, C.

October 10, 1899, the Boston Investment Company filed its petition in the office of the clerk of the district court for Butler county asking judgment against the defendant (plaintiff in error in this court) for the amount due on two promissory notes. On the same day an affidavit for an attachment was filed and an order of attachment thereupon issued and delivered to the sheriff of the county who returned the same into the office of the clerk of the district court October 18, 1899, with his return of service indorsed thereon showing that he had attached the southwest quarter of section 20, township 13, range 3, as the property of the defendant. In this connection it should be stated that the affidavit for the attachment was made and verified October 7, 1899, three days before it was filed with the clerk. October 21, 1899, the following affidavit for service by publication was filed:

"THE STATE OF NEBRASKA, }
LANCASTER COUNTY. } ss.

"J. S. Kirkpatrick being first duly sworn on oath according to law says that he is the attorney for the plaintiff, that the plaintiff is a corporation, that on the 10th day of October, 1899, the plaintiff filed its petition in the district court of Butler county against the defendant Edwin Alonzo Barnes, the object and prayer of which are to recover a judgment against the defendant for the sum of \$1,854.18 upon two promissory notes signed by said Edwin Alonzo Barnes, and delivered to the First National Bank

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of Lincoln and by said bank sold, indorsed and transferred to this plaintiff.

"Said notes were dated on the fourth day of February, 1898, one was for \$1,362, drawing interest from maturity and due and payable thirty days after date; the other note was for \$251.90 with interest at the rate of 10 per cent. per annum from maturity and due and payable thirty days from date. That there is now due upon said notes the sum of \$1,854.18, with interest at the rate of 10 per cent. per annum from the 4th day of October, 1899. Affiant further says that the plaintiff has caused to be issued out of the district court of Butler county an order of attachment in said cause against the defendant, and the sheriff of said county has levied the same upon the southwest quarter of section twenty in township thirteen north of range three east in Butler county, Nebraska (S. W. $\frac{1}{4}$ Sec. 20, T. 13, N. R. 3, E.), for the satisfaction of the amount due and the plaintiff prays that said premises may be sold for the satisfaction of said debt. Affiant further says that the defendant, Edwin Alonzo Barnes, is a non-resident of the state of Nebraska and is absent therefrom and that summons cannot be served upon him in said state and asks for service by publication.

"J. S. KIRKPATRICK.

"Subscribed in my presence and sworn to before me this 19th day of October, 1899.

"C. H. EUBANK, *Notary Public.*"

February 24, 1900, Barnes made a special appearance and filed a motion "for the special purpose of objecting to the jurisdiction of the court over the person of the defendant in this cause," and set out as his grounds of said motion: "1st. That the affidavit for attachment herein alleging that the plaintiff had commenced an action in the district court of Butler county was made and sworn to on the 7th day of October, 1899, whereas the fact is that this action had not been commenced at that time but that the petition of the plaintiff herein was not filed until the 10th

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day of October, 1899, all of which is shown by the records and files herein. 2d. That the affidavit for service upon the defendant by publication filed herein is insufficient and void and is not in accordance with the statutes of the state of Nebraska in that behalf made and provided, being section 78 of the Code of Civil Procedure of said state in this: that said section 78 provides that before service by publication can be made upon the defendant such affidavit therefor shall set forth among other facts that the case is one of those mentioned in section 77 of said Code, which said affidavit filed herein and upon which service by publication is sought to be had upon the defendant, entirely fails to set forth, for that this action is one based upon attachment proceedings and the defendant is a non-resident of the state of Nebraska, and said affidavit entirely fails to set forth that said defendant has property in this state or debts owing to him in this state, all of which appears from the records and files herein and from said affidavit. 3d. That the defendant has no legal title in and to the lands upon which the said attachment has been levied as per the return of the sheriff who purports to have levied the same, being the southwest quarter of section 20, township 13 north, range 3 east of the 6th P. M. in Butler county, Nebraska, which is shown by the affidavit of George P. Sheesley hereto attached and made a part hereof."

The district court overruled the foregoing objections and entered judgment finding the amount due the plaintiff and ordered that the sheriff proceed as upon execution to advertise and sell so much of the attached property as would satisfy the judgment and costs. The defendant has taken error to this court and now insists that the court had no jurisdiction to enter said judgment.

We very much doubt whether the objections made by the plaintiff in error present anything for the consideration of the court. These objections, it will be observed, went entirely to the jurisdiction of the court "over the person of the defendant." The whole record shows that no

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attempt was made to gain jurisdiction of the person of the defendant. The proceeding was *in rem* and directed against the property of the defendant. The issue of an attachment and a levy thereunder placed the property within the jurisdiction of the court and after due notice to the defendant by publication or otherwise the court could rightfully proceed to determine the amount due the plaintiff and to order the attached property sold in satisfaction thereon. *Darnell v. Mack*, 46 Neb., 740; *Rachman v. Clapp*, 50 Neb., 648.

The plaintiff in error in his brief has argued the question upon the theory that his objections raised the question of the sufficiency of the affidavit for publication and, as we understand him, insists that said affidavit does not comply with our statute in that it fails to show that the defendant had property in this state which is sought to be reached in this proceeding. While we do not think the objections properly raise the question, we have, nevertheless, examined the affidavit and think it fully complies with the statute. The affidavit was not made until after the sheriff had attached the property and made a return of his doings under the writ. The affidavit states that plaintiff had caused an attachment to issue and that the sheriff of the county had levied upon the southwest quarter of section 20, township 13, range 3, for the satisfaction of the amount due and that a sale of said land was demanded. It further shows that the defendant is a non-resident of the state and that summons can not be served upon him in the state. This is a sufficient showing that the action was one "brought against a non-resident of this state * * * having in this state property * * * sought to be taken by any of the provisional remedies" and this is a sufficient compliance with section 78 of our Code of Civil Procedure.

We discover no error in the record and therefore recommend the affirmance of the judgment of the district court.

AMES and ALBERT, CC., concur.

AFFIRMED.

Marcus v. Leake.

MAURICE MARCUS V. C. A. LEAKE ET AL.

FILED MARCH 18, 1903. No. 12,490.

Commissioner's opinion. Department No. 1.

1. **Trial: INSTRUCTIONS: REFUSED TO PARTY, GIVEN BY COURT.** A judgment will not be reversed for failure of the trial court to give an instruction tendered where the matters therein referred to have been substantially covered by other instructions given.
2. **Fraudulent Conveyances: RELATIVES: BONA FIDES: BURDEN OF PROOF.** Transfers of property between relatives, whereby creditors have been hindered, delayed or defeated in the collection of their claims, will be closely scrutinized, and the burden is upon those claiming under such transfers to show the good faith thereof; and this rule applies to a mortgagee who stands to the mortgagor in the relation of brother-in-law.
3. **Fraudulent Conveyances: RELATIVES: INTENT: BURDEN OF PROOF: INSTRUCTIONS.** Instruction examined, and *held* not to be erroneous.

ERROR from the district court for Hall county. Tried below before THOMPSON, J. *Affirmed.*

W. H. Thompson and W. H. Platt, for plaintiff in error.

Harrison & Pearne and W. A. Prince, contra.

KIRKPATRICK, C.

This is a proceeding in error brought to reverse a judgment of the district court for Hall county. The action was upon a constable's bond, whereon one C. A. Leake was principal, and the other defendants were bondsmen. Plaintiff sought to recover damages for the wrongful taking of certain property, claimed by him under and by virtue of a chattel mortgage, but which was seized by Leake under various writs of attachment against the mortgagor of plaintiff. It appears that on and prior to August 24, 1897, one Wolf Lebovitz was engaged in the mercantile business in the city of Grand Island, and that he was at that time considerably involved in debt. On that day he

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executed and delivered to plaintiff, who was his brother-in-law, and a former partner, a chattel mortgage on his entire stock of goods and fixtures, to secure the sum of \$4,476.65, for which amount it was claimed he was indebted to plaintiff. The mortgage was placed of record the same day, and plaintiff claims to have taken immediate possession on the afternoon of that day, when defendant C. A. Leake, a constable, levied upon and carried away a part of the goods of the alleged value of \$1,155.30, and on August 22, levied upon certain additional goods of the alleged value of \$366.75, the various seizures being made in satisfaction of certain executions and writs of attachment then in his hands in favor of the creditors of Lebovitz.

The defendants pleaded that Lebovitz was not indebted to plaintiff in any sum whatever; that plaintiff was related to Lebovitz as brother-in-law, and that the mortgage under which he claimed was made in fraud of creditors, and for the purpose of hindering, cheating, delaying and defeating the creditors of Lebovitz in the collection of their claims. It was pleaded that plaintiff never took possession of the goods under his mortgage, but that Lebovitz remained in possession and continued in the management of the business. Plaintiff did, however, advertise the goods for sale under his mortgage, his theory upon the trial of the cause being that Lebovitz was acting as his clerk. Issue being joined, and trial had, the cause was, under instructions by the court, submitted to the jury, who returned a verdict for defendants, and judgment was accordingly entered.

In this proceeding, plaintiff assigns error on the part of the trial court in the giving and refusal of certain instructions, and in instructing that the burden of proving the good faith of the chattel mortgage was upon plaintiff, upon the theory that he was a relative of Lebovitz and that he was in possession when the levies were made.

Plaintiff requested two instructions which were refused. They are in the language following:

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"No. 10. But before this rule applies the burden is upon the defendants to show by a preponderance of the evidence that the said property was left in the possession of Lebovitz in his own right, and was so held by Lebovitz at the time of and just before the levy.

"No. 11. The fact that it did hinder and delay creditors by reason of the giving of the plaintiff's mortgage is not sufficient, but you must find from the evidence that that was the moving intent in giving the mortgage."

It is apparent that the first instruction quoted above is but the fragment of an instruction, and we are unable to apprehend the object plaintiff had in tendering it in such form. No explanation thereof is made in brief of counsel, and we can only gather by inference that it was intended as an *addendum* to No. 10, given by the court on request of defendants, which is as follows:

"You are instructed that a chattel mortgage, although filed for record, is *prima facie* fraudulent as to creditors and *bona fide* purchasers, if the mortgagor retains possession of the mortgaged property, and the persons claiming under such mortgage must make it appear that the same was made in good faith in order to recover."

We are of opinion that this instruction correctly states the law, and when taken in connection with the other instructions given by the court, it can not be said to be objectionable in respect of any complaint now urged by plaintiff. So far as the other instruction quoted above is concerned, it may be said that error can not be predicated upon its refusal, as the matter therein set forth was substantially covered by other instructions given.

The court instructed the jury in the following language: "You are instructed that it is not only the honesty of the debt secured, but the purpose of the conveyance to which the statute has referred. An honest debt is an important part of the transaction, but if the mortgage was given by the mortgagor and taken by the mortgagee with intent to hinder and delay creditors, then it is void, though an honest debt be secured by the instrument."

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This instruction is alleged as error, but we are unable to see wherein the court erred in its giving. We do not believe that the trial court, in the giving of this instruction, extended the scope and purpose of the provisions of chapter 32 of the Compiled Statutes (Annotated Statutes, section 5950 *et seq.*). An instruction substantially similar was approved by this court in *Landauer, Kaim & Streng v. Mack & Co.*, 43 Neb., 430, 436. Other errors referred to in briefs are not specifically pointed out and we can not consider them.

A further contention is that there was error committed by the court in that the instructions, taken as a whole, assume that a relationship existed between plaintiff and Lebovitz, within the meaning of the rule, many times recognized by this court, governing the burden of proof in cases wherein transfers of property between relatives are alleged to be in fraud of creditors. The court in the case at bar instructed the jury that transfers between relatives, if creditors are thereby delayed, hindered, or defeated, in the collection of their debts, should be scrutinized closely, and that upon the claimants under such transfers rested the burden of showing the *bona fides* of the transactions. *Fisher v. Herron*, 22 Neb., 183; *Heffley v. Hunger*, 54 Neb., at page 779. The contention of plaintiff in error seems to be that a brother-in-law is not a relative within the meaning of the rule referred to. We are unable to accept this view. There can be no doubt that a brother-in-law comes within the recognized and well-settled meaning of the word "relative." Winfield, *Adjudged Words and Phrases*, 526; *Paddock v. Wells*, 2 Barb. Ch. [N. Y.], 33; *Carman v. Newell*, 1 Denio [N. Y.], 25. From an examination of the entire record, we find no prejudicial error. Justice seems to have been done and it is recommended that the judgment be affirmed.

HASTINGS and LOBINGIER, CO., concur.

AFFIRMED.

Spence v. Apley.

CHARLES SPENCE V. C. D. APLEY.

FILED MARCH 18, 1903. No. 12,571.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: ASSIGNMENTS: NEW TRIAL, OVERRULING MOTION FOR.** *Achenbach v. Pollock*, 64 Neb., 436, 90 N. W. Rep., 304, and *Gandy v. Cummins*, 64 Neb., 312, 89 N. W. Rep., 777, followed.
2. **Frauds, Statute of: PAROL ACCEPTANCE OF WRITTEN OFFER: BROKERS.** Parol acceptance of an offer in writing does not constitute a contract in writing subscribed by both parties within the purview of section 74, chapter 73, Compiled Statutes [Annotated Statutes, section 10258].

ERROR from the district court for Thayer county. Tried below before STUBBS, J. *Affirmed.*

J. B. Skinner, for plaintiff in error.

T. C. Marshall, contra.

POUND, C.

Plaintiff sued to recover commissions as a real estate broker for procuring a purchaser and negotiating a sale of land for the defendant. The latter had refused to consummate the sale arranged. A verdict for the defendant was directed at the trial, and error is prosecuted from the resulting judgment.

The petition in error contains no assignment of error in overruling the motion for a new trial, so that we are not obliged to consider any of the errors assigned. *Achenbach v. Pollock*, 64 Neb., 436, 90 N. W. Rep., 304; *Gandy v. Cummins*, 64 Neb., 312, 89 N. W. Rep., 777. We may say, however, that the ruling of the trial court seems to have been quite right. Plaintiff sought to prove his contract of employment by introducing a letter written by the defendant, and then proceeded to show that acting upon the letter he had procured a purchaser and arranged a sale. Section 74, chapter 73, Compiled Statutes [Annotated

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Statutes, section 10258], requires such contracts to be in writing and signed by both parties. In *Kingman & Co. v. Davis*, 63 Neb., 578, 88 N. W. Rep., 777, we held that parol acceptance of an offer in writing did not give rise to an agreement or contract in writing within the purview of section 11, Code of Civil Procedure. The same reasons would warrant us in holding that the agreement resting partly in writing and partly in parol was not a contract in writing subscribed by both parties within the meaning of said section 74.

We recommend therefore that the judgment of the district court be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

CHARLES P. CARLSON V. I. H. JORDAN ET AL.

FILED MARCH 18, 1903. No. 12,618.

Commissioner's opinion. Department No. 1.

1. Trial: VERDICT ONLY ONE POSSIBLE: PREJUDICE. Where the verdict reached is the only possible one under the facts, errors in the trial are not prejudicial.
2. Conversion: AUTHORIZED BY PLAINTIFF: ACTION FOR PRICE OF PROPERTY. No action for conversion will lie on account of a disposition of property which plaintiff admits authorizing. If he has an action, it is for the price of the property.
3. Conversion: ACTION BY ASSIGNEE OF SELLER: ACTION FOR PRICE OF PROPERTY. The assignee of one who has sold property which has not been paid for has only an action for its price. He cannot recover for a conversion.

ERROR from the district court for Kearney county. Tried below before BEALL, J. *Affirmed.*

G. Norberg and J. L. McPheely, for plaintiff in error.

E. C. Dailey and Ed. L. Adams, contra.

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HASTINGS, C.

This action was for conversion. Plaintiff sets out two grounds of recovery, one for 800 bushels of corn grown on section 13, township 5, range 17, Phelps county, Nebraska, in which he claims a mortgagee's interest to the amount of \$50.20 and interest from May 24, 1895, at 10 per cent., which corn he says defendants have converted to their own use. The second cause of action is for 400 bushels of corn, in which one Peter Carlson is alleged to have had a mortgagee's interest to the amount of \$50, which he has assigned to plaintiff, and which corn it is alleged that the defendants have converted. Plaintiff's right of possession in each lot of corn is asserted in general terms.

Defendants' answer says that no cause of action is alleged; that defendants were grain dealers in the market at Wilcox, Nebraska; that they bought of one Cederborg and Peter Carlson corn to the value of \$88.60 and became indebted to Cederborg and Carlson in that sum; that on December 14, 1895, they were garnished to appear before a justice of the peace in Kearney county, at suit of State Bank of Wilcox in an action against Cederborg and Carlson, and in that action defendants answered stating their indebtedness and were ordered to pay into the said justice court the \$88.60 due from them to Cederborg and Carlson, and paid it, and were discharged from any further liability; that said bank recovered judgment against Cederborg and Carlson in that action. The defendants deny that plaintiff had any lien or title to any of the corn purchased by them and deny the conversion of such corn.

To this answer a general denial was filed. At the trial a verdict was returned for the defendants and from a judgment upon that verdict the plaintiff brings error to this court.

The errors alleged in the motion for new trial and in the petition in error are, that the verdict is contrary to law; contrary to the evidence; error in admitting in evidence the transcript of the bank's judgment against Ceder-

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borg and Carlson; error in statement made by the presiding judge as to his reasons for admitting in evidence the plaintiff's mortgage, and error in refusing and giving instructions. The only ground for reversal, however, which is urged in the brief of plaintiff in error is the insufficiency of the evidence to support a verdict.

In our view of the case upon the plaintiff's statement of it, it is unnecessary in any event to look further than the evidence, because it seems to us entirely insufficient to establish any conversion on the part of the defendants and therefore the verdict must be right as there is no complaint of any error in the exclusion of evidence.

The plaintiff held a mortgage dated May 24, 1895, upon "my 3-5 interest in twenty-five acres of corn now growing on northeast quarter of section 13, township 5, range 17, Phelps county, Nebraska" given by one John N. Cederborg to secure payment of a note of the same date for \$50.20 due January 1, 1896. Plaintiff testifies that Cederborg was farming the east half of that section and plaintiff himself lived on the same section; he testifies that Cederborg had 110 acres of corn on the quarter section mentioned and that the mortgage and note were given to plaintiff in consideration of seed and feed furnished by him to Cederborg to enable the latter to get in his crop, and that nothing had been paid upon it; that at the time the mortgage was given, the corn was up; that when Cederborg husked the corn on this northeast quarter, he placed it in three piles upon the adjoining southeast quarter; that the northernmost of these three piles was designated as the plaintiff's corn; that the second pile was designated as Peter Carlson's corn, who was apparently the landlord, and the third as Kridelbaugh & Youngquist's, who claimed liens upon the corn. Plaintiff further testified that he directed his pile of corn to be hauled to market by Cederborg and sold; that Cederborg was to bring the proceeds to plaintiff. Plaintiff also states that the defendant Jordan told him that some of the corn was sold as Peter Carlson's and some as plaintiff's. This evidence is not denied. Defend-

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ants offered no testimony except the transcript of the record showing their garnishment and their payment of all the money for the corn, which had not been turned over to Cederborg, into court pursuant to the order in garnishment.

It is claimed that these garnishment proceedings are void as regard plaintiff's mortgage because Jordan & Hynes had notice that the ownership of the corn was in plaintiff and also because it was so entirely irrespective of any defective description in the mortgage; that the corn having been divided and having been sold to defendants as plaintiff's corn, they were not at liberty to pay out the money for it on any garnishment against them as creditors of Cederborg, and it is claimed, as regards the Peter Carlson corn, that his title was assigned to the plaintiff on December 16, by the following instrument:

"WILCOX, NEB., Dec. 16, 1895.

"For value received I hereby sell and assign to Chas. P. Carlson act. due me for four loads of corn sold to and delivered by J. N. Cederborg and authorize said Chas. R. Carlson to collect the same.

"Attest: G. NORBERG.

his
PETER X CARLSON."
mark

All of this corn of both lots had been sold and delivered to the defendants prior to December 14, and the garnishment notice was served on defendants on that day. It is claimed that the garnishment proceedings are void as to Peter Carlson for the reason that no service of summons was had upon him in that action.

That action was brought originally against Cederborg, Peter Carlson and A. Carlson; summons was served upon Cederborg and A. Carlson. The return, however, was silent as to Peter Carlson. On the answer day hearing was had on the answer of the garnishees, and they were ordered to pay the money into court, which was done, and the justice then entered an order continuing the case for publication of notice as against Peter Carlson, and this was published.

Carlson v. Jordan.

It is true that the record fails to disclose any reason why Peter Carlson was not served personally with summons together with the other defendants, and it is quite probable that the record as it stands fails to disclose any jurisdiction as to Peter Carlson, except such as was acquired by the issuance of the attachment under a proper affidavit, and garnishing the present defendants. It seems clear, however, that whatever defects there might be in the garnishment proceedings there is no liability on the part of defendants for the conversion of any corn. It is clear that the corn was sold to them by Cederborg and Peter Carlson. Whatever claim plaintiff had upon the Peter Carlson corn accrued to him after its owner had appeared with it and sold it in the open market to these defendants, and the very utmost which Peter Carlson could do after that was to assign his claim for compensation under his contract of sale for the corn delivered. That is not this action, and such proof does not tend to establish any conversion of the Peter Carlson corn. The case of the plaintiff, as to his own mortgaged corn, is no better. On his own statement he had authorized Cederborg's sale of this corn in the market to the defendants. If he had any right of action at all, it was for the price of such corn as Cederborg sold to the defendants and did not draw the pay for. It is elementary that there can be no conversion of property whose owner is consenting to its disposition. *Tousley v. Board of Education*, 39 Minn., 419, 40 N. W. Rep., 509; *Griffin v. Bristle*, 39 Minn., 456, 40 N. W. Rep., 523.

When any person, himself, arranges for the disposition of property, he can not afterwards either by himself or by any subsequent assignee assert a claim that such disposing was a conversion. No cause of action is alleged in this case except conversion. The sale to defendants was fully authorized by the plaintiff and by Peter Carlson while he owned his part of the corn, and whether or not defendants have paid for the corn, there can be no recovery for it by an action in conversion. The verdict was the only one

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possible and any errors in reaching such a result are not prejudicial.

It is recommended that the judgment of the district court be affirmed.

KIRKPATRICK and LOBINGIER, CC., concur.

AFFIRMED.

NEBRASKA LOAN & TRUST COMPANY, APPELLEE, v. ERNEST
B. CORNING ET AL., APPELLANTS.

FILED MARCH 18, 1903. No. 12,636.

Commissioner's opinion. Department No. 2.

Mortgages: FORECLOSURE: OBJECTIONS NOT RAISED BELOW.

APPEAL from the district court for Sherman county.
Tried below before SULLIVAN, J. *Affirmed.*

Aaron Wall, for appellants.

W. R. Mellor and *John M. Ragan*, contra.

POUND, C.

This is an appeal from an order confirming a sale under decree of foreclosure. The points argued in this court are not without some force, but none of them were raised in the objections to confirmation filed in the district court, and none of the points there urged are discussed in the brief in this court. There is nothing before us.

We therefore recommend that the order be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

Guthrie v. Guthrie.

ROBERT E. GUTHRIE, JR., ADMINISTRATOR OF THE ESTATE
OF ROBERT E. GUTHRIE, SR., DECEASED, APPELLEE, V.
EDWIN R. GUTHRIE ET AL., APPELLEES, IMPLEADED
WITH SARAH H. GARMAN, APPELLANT, ET AL.

FILED MARCH 18, 1903. No. 12,658.

Commissioner's opinion. Department No. 3.

1. **Appeal and Error: EVIDENCE ON APPEAL.** On appeal to this court, as distinguished from proceedings in error, evidence excluded by the trial court will not be considered.
2. **Mortgages: FORECLOSURE: EVIDENCE SUFFICIENT.** Evidence examined, and held to sustain the order denying confirmation of a foreclosure sale.

APPEAL from the district court for Lancaster county.
Tried below before HOLMES, J. *Affirmed.*

F. M. Hall and C. L. Poor, for appellant.

Tibbets Bros., Morey & Anderson, contra.

ALBERT, C.

This is an appeal from an order of the district court denying confirmation of a sale under a decree of foreclosure. The following facts are sufficiently shown in evidence: The notes and mortgages upon which the decree in this case is based were executed to one Robert E. Guthrie, Sr., in his lifetime, and the payee died intestate on the 31st day of May, 1892, in Sedgwick county, Kansas. On the 16th day of November, in the same year, Robert E. Guthrie, Jr., was appointed administrator of the estate of the intestate by the probate court of said county and the notes and mortgages aforesaid came into his hands as a part of the assets of the estate. In February, 1894, the administrator brought this action in the district court for Lancaster county, to foreclose the mortgages. In 1895, and before a decree in this case, the administrator, in pursuance of an order of the probate court granting adminis-

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tration, made a sale of the assets of the estate, including the notes in question, to Lucy Guthrie, which was afterward, in the same year, approved and confirmed by the court ordering the sale. On the 6th day of December, 1895, Lucy Guthrie died testate and, by the terms of her will, the notes and mortgages in question were left to the children of E. R. Guthrie. Robert E. Guthrie, Jr., was one of the executors of her will and, as such, held possession of the notes and mortgages in question, after her death, to the time of the rendition of the decree in this case. The foreclosure proceedings proceeded in the name of the administrator of the estate of Robert E. Guthrie, Sr., and a decree was entered therein in favor of such administrator on the 6th day of May, 1897. On the 2d day of October, 1899, the following instrument was filed in this case:

“Whereas, I, the undersigned, administrator of the estate of Robert E. Guthrie, Sr., deceased, was by the order of the county court of Lancaster county, Nebraska, directed and ordered to offer at public sale as an asset of said estate a decree of foreclosure theretofore rendered in the district court of Lancaster county, Nebraska, in a case wherein Robert E. Guthrie, Jr., administrator, was plaintiff and Edwin R. Guthrie, et al., were defendants, being Docket 10, page 177, and

“Whereas, in pursuance of said order, the said decree was by me duly advertised for sale and sold at public auction to Sarah H. Garman, for the sum of \$3,500, which said sale was thereafter duly confirmed in all things by the county court of Lancaster county, Nebraska, and an order entered directing the administrator to sell and transfer the said decree to the said purchaser.

“Now, Therefore, I, Elmer B. Stephenson, administrator of the estate of Robert E. Guthrie, Sr., deceased, in consideration of the sum of \$3,500, paid by said Sarah H. Garman, do hereby sell, assign, transfer and set over to the said Sarah H. Garman the said decree, being a decree of foreclosure rendered in the district court of Lancaster county, Nebraska, on the 6th day of May, 1897, in

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the sum of \$6,179.97 with interest thereon at the rate of 8 per cent. per annum from the date of the decree, in a case wherein Robert E. Guthrie, Jr., administrator, was plaintiff and Edwin R. Guthrie, et al., are defendants, being Docket No. 10, page 177, of the records of the clerk of the district court of Lancaster county, Nebraska."

Subsequently, an order of sale issued in the foreclosure case and the property covered by the decree was offered for sale and sold to Sarah H. Garman, the assignee named in the foregoing assignment. Objections were lodged against the confirmation of the sale, one of which being that the purchaser had not paid into court or to the sheriff the amount of her bid. The objections were sustained and confirmation denied. The purchaser appeals.

It is conceded that the plaintiff never paid nor offered to pay the amount of her bid, which was less than the amount of the decree. Her contention is that she is the sole owner of the decree, by virtue of the assignment above set forth and, consequently, no payment nor tender of payment was required of her to entitle her to a confirmation of the sale. There is no evidence to support this contention. The only evidence tending in the remotest degree to show that she was the owner of the decree, is the assignment filed in the case, purporting to have been made by the administrator of the estate to Robert E. Guthrie, Sr. The administrator named in that instrument is not the administrator who prosecuted the action as plaintiff. The evidence, touching his appointment and qualification as such administrator, was excluded by the court and can not be considered on appeal. *Ainsworth v. Taylor*, 53 Neb., 484; *Alling v. Nelson*, 55 Neb., 161; *National Life Insurance Co. v. Martin*, 57 Neb., 350. That the bare recital in the assignment, of the official character of the assignor and his authority to make the assignment, was insufficient to prove such facts, is clear. Hence the purchaser, not having paid, nor offered to pay, the amount of her bid, and not having shown that she was the owner of the decree, confirmation was properly denied.

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Other questions are discussed by counsel, but they are such as could arise only upon a record showing a grant of administration by some probate court of this state. As before stated, all evidence on that point was excluded. By electing to prosecute an appeal instead of proceeding in error, the appellant submits the case to this court on the same evidence upon which the issues were determined in the court below. Such evidence conclusively shows that the order appealed from is right. That being true, it would serve no useful purpose in this proceeding to speculate on the probable effect of the excluded testimony, had it been admitted.

It is recommended that the order of the district court denying confirmation of the sale be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

THE DAWSON COUNTY NATIONAL BANK, APPELLANT, V.
CHARLES OLDFATHER ET AL., APPELLEES.

FILED MARCH 18, 1903. No. 12,674.

Commissioner's opinion. Department No. 2.

Crops: OWNERSHIP: INJUNCTION: EVIDENCE SUFFICIENT. Evidence examined, and *held* sufficient to sustain the judgment of the district court.

APPEAL from the district court for Dawson county.
Tried below before SULLIVAN, J. *Affirmed.*

H. D. Rhea and G. W. Fox, for appellant.

Edward A. Cook, contra.

OLDHAM, C.

In this case the plaintiff in the court below brought an action asking for an injunction to restrain defendants

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from harvesting a crop of rye growing on certain lands situated in Dawson county, Nebraska. The petition alleged that plaintiff was the owner and in possession of a two-thirds interest in the crop of rye; that the defendants were threatening to enter upon the premises and harvest the rye and convert the same to their own use; that the defendants were insolvent, and that plaintiff had no adequate remedy at law for the redress of the threatened trespass. On this petition a temporary order of injunction was granted by the county judge of Dawson county. Plaintiff thereupon harvested the rye crop, sold the same and converted the proceeds thereof to its own use.

Defendants subsequently filed an answer to plaintiff's petition, denying that the petition stated any cause for equitable relief, and alleged that they were the owners of a two-thirds interest in the crop of rye, and that plaintiff after the temporary injunction was issued had entered on the premises, harvested the rye, converted the same to its own use to defendants' damage in the sum of \$2,000, and asked that the cause proceed as an action at law to determine the rights of property between plaintiff and defendants to the two-thirds interest in the rye crop in dispute.

Plaintiff filed a reply to this answer alleging that it was the owner of the rye in dispute and that defendants had purchased the crop from one Radcliff with full knowledge of the fact that plaintiff was the owner thereof at the time such purchase was made.

On issues thus joined a trial was had to the court, who dissolved the injunction and found on the legal issues in favor of defendants, and entered a judgment in their favor for \$300 damages against the plaintiff; plaintiff brings the cause to this court for review on appeal.

On the trial of the cause the issues raised on plaintiff's petition for an injunction seem to have been practically lost sight of. On this issue, however, there is a finding of fact based on the testimony that one of the defendants was fully solvent and worth more than \$3,800 over and above all legal exemptions; this finding fully supports the judg-

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ment of the district court in refusing the injunction prayed for by plaintiff.

On the trial of the rights of property neither party appears to have requested a jury and the right of the court to try this issue without the intervention of a jury is one that can not be reviewed by this court on appeal.

The whole contention in the trial of the cause was with reference to the ownership of the rye. Plaintiff contending that Radcliff had put the crop in under an agreement with it by which it was to furnish the seed and feed for his teams, and that when the crop was harvested he was to deliver two-thirds of it to a mill in the town of Lexington, and that he was to receive credit for the market value of his interest in the rye on a large indebtedness which he owed to the plaintiff. Defendants claimed a two-thirds interest of the crop under a bill of sale from Radcliff. There was a conflict of testimony on the question of ownership, and the court below found in favor of defendants' contention.

Without determining whether or not we can review the proceedings of the legal action on appeal, it is sufficient to say that there is competent testimony in the record to sustain the judgment of the district court, and this is the only question we are asked to review in the brief of appellant.

It is therefore recommended that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

MARY R. MCCOWAN ET AL., APPELLANTS, V. WALTER B.
VOTAW ET AL., APPELLEES.

FILED MARCH 18, 1903. No. 12,677.

Commissioner's opinion. Department No. 3.

Appeal and Error: EXCEPTIONS, BILL OF: FAILURE TO FILE: PLEADING.
When, after issue joined, there has been a trial and the record

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recites that the plaintiff introduced all his evidence, which the trial court found to be insufficient and dismissed the action, the judgment will not be reviewed in this court in the absence of a bill of exceptions, although it also recites that in the opinion of the trial judge the petition does not state facts sufficient to constitute a cause of action.

APPEAL from the district court for Frontier county.
Tried below before NORRIS, J. *Affirmed.*

J. A. Williams and J. L. White, for appellants.

L. H. Cheney, contra.

AMES, C.

This is an action to perpetually enjoin the county board of Frontier county from laying out and establishing a public road across certain lands of the appellants. The answer denies all the material averments of the petition, besides alleging certain affirmative matters by way of defense. There was a trial, at the conclusion of which the court found generally for the defendants and rendered a judgment of dismissal and for costs. The plaintiffs appeal, but have failed to bring with the transcript an authenticated bill of exceptions, so that we are unable to ascertain whether the finding of fact was supported by the evidence. The court inserted among its findings a statement that it did not consider that the petition states a cause of action, but it does not appear that we are helped by that fact. It is recited that the plaintiffs introduced all their evidence and rested, but if we should be of opinion that the petition does state a cause of action, we should still be ignorant whether it was sustained as to controverted particulars, and the trial court held expressly that the evidence as well as the pleading, was insufficient. In this state of the record a finding by this court that the petition does state a cause of action, concerning which we express no opinion, would lead to no practical result.

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It is recommended that the judgment of the district court be affirmed.

ALBERT and DUFFIE, CC., concur.

AFFIRMED.

LOUIS WERNER ET AL. V. CAROLINE LINSENMEYER ET AL.

FILED MARCH 18, 1903. No. 12,678.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: ATTACHMENT: EVIDENCE SUFFICIENT.** The judgment or order of a district court on a motion to dissolve an attachment will not be reversed if sustained by sufficient competent evidence.
2. **Attachment: EVIDENCE SUFFICIENT.** Evidence examined, and *held* sufficient to sustain the finding and order of the trial court.

ERROR from the district court for Gage county. Tried below before LETTON, J. *Affirmed.*

M. B. Davis, for plaintiffs in error.

E. O. Kretsinger, contra.

KIRKPATRICK, C.

This is an error proceeding brought for the purpose of reversing an order made by the district court for Gage county discharging an attachment in an action pending in that county, wherein plaintiffs in error were plaintiffs and defendants in error were defendants. It appears from the record that some time prior to November 26, 1901, plaintiffs instituted an action against Caroline Linsenmeyer to recover the sum of \$800 with interest for alleged breach of warranty in a conveyance of certain real estate made by defendants to plaintiffs. On the day named, an affidavit for attachment was filed, alleging the non-residence of Caroline Linsenmeyer and her husband, Andreas Linsenmeyer, and an attachment was duly issued and

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levied upon the property in which defendants had been residing for many years. A motion for dissolution of the attachment was filed, presenting numerous reasons, among them being that the property was the homestead of defendants, and that the matters set out in the affidavit were untrue. Issue being joined upon affidavits, the question was tried to the district court, the trial resulting in an order dissolving the attachment, to reverse which this proceeding is brought.

It is contended that the trial court erred in overruling the motion filed by plaintiffs to strike from the files the affidavits filed by Caroline and Carl Linsenmeyer, the reasons assigned in these motions being, first, that Caroline Linsenmeyer was unable to read the English language, as appeared from her answer filed in the case, and that it did not affirmatively appear from her affidavit that it had been read to her and that she understood its contents; second, that the affidavit had been dictated by her attorney in the action; that the affidavit had been taken before a notary who was a clerk in the office of the said attorney, and as such was interested in the result of the action; and fourth, that the notary public had failed to note the expiration of her commission as a notary under her signature, and that such date of expiration did not appear from her seal. It is further contended that the action of the trial court in the dissolution of the attachment is not sustained by sufficient evidence.

In our view of the case, it will only be necessary to consider the assignment last mentioned. It is contended by counsel for defendants, that leaving out of consideration the affidavits last mentioned, regarding which the motion to strike was made, there is still in the record abundant evidence to sustain the action of the trial court. It appears from the affidavits other than those mentioned that defendants had been residing in the property attached as a homestead since 1892 continuously; that the family consisted of the husband and the wife, and of a number of children, three of whom were minors at the date of the

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attachment. It is further disclosed that on November 15, twelve days before the attachment was issued, defendants went on a visit to Oklahoma Territory, leaving in possession of the residence their eldest daughter, who had just married, her husband and the minor children of the defendants in error. They left all of their furniture and household goods of every kind and description in the house, taking with them only their wearing apparel. During their absence, the married daughter kept house for her younger brothers and sisters. On December 8, eleven days after the attachment was levied, Caroline Linsenmeyer returned to her home from Oklahoma, and her husband returned some time in January following.

The most that can be contended by plaintiffs to be established by their affidavits is that before leaving, Caroline Linsenmeyer made statements to several persons that her brother, who had a farm in Oklahoma, wanted her and her husband to come and live in the house on his farm, the wife to keep house, and the husband to assist in the management of the farm; that she also said they were going down there for a while to see how they liked the country, and that if they were favorably impressed with it, they would sell their home in Beatrice, and take up their residence in the Territory; that she had in a conversation with a person living in or near Beatrice, offered to sell the home, and that she had also then offered to sell a hanging lamp, saying that her brother's house in Oklahoma was furnished, and that, therefore, she would not need such things; that she had rented the house to her son-in-law, who was to pay her \$3 per month rent, and one of her sons was to board in his sister's family. All of these statements are positively denied by Caroline Linsenmeyer in her affidavits in rebuttal, to which no objections are made. She is corroborated by the affidavits of some of her children, as well as by her neighbors, all tending to show that the purpose in making the trip to Oklahoma was to visit her brother, and that she expected to return in a short time. It is nowhere charged in the affidavits,

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and there is no evidence tending to show, that the husband ever spoke about abandoning the homestead. Even conceding that the defendant Caroline Linsenmeyer made all the statements attributed to her, the evidence would still fall far short of showing an abandonment of the homestead. In these alleged statements she is represented as speaking of a contingent abandonment and removal from the state. It would be a harsh construction, indeed, wholly unwarranted on principle, to hold upon such statements that the homestead had been abandoned. The trial court found that the defendants had not abandoned their homestead, and under the evidence, after excluding the affidavits complained of, it must be held that the finding of the trial court is well sustained.

The only statutory ground upon which this attachment was sought to be sustained is that the defendants were non-residents. It was so alleged in the affidavit of attachment, and an attempt made to show that defendants had left the state with the intent and for the purpose of taking up their residence in Oklahoma. The evidence heretofore referred to quite satisfactorily establishes that the homestead had not been abandoned, that consequently defendants were not non-residents, and it follows that the motion to discharge the attachment was, by the trial court, properly sustained.

It is therefore recommended that the order of the district court be affirmed.

HASTINGS and LOBINGIER, CC., concur.

AFFIRMED.

State v. Follmer.

THE STATE OF NEBRASKA, EX REL. JOHN F. NEELAND, V.
GEORGE D. FOLLMER, COMMISSIONER OF PUBLIC LANDS
AND BUILDINGS, ET AL.

FILED MARCH 18, 1903. No. 12,747.

Commissioner's opinion. Department No. 1.

1. **Mandamus:** PUBLIC LANDS: LEASING: QUÆRE. Whether any mandamus will lie to control action of the state commissioner of public lands and buildings in determining to whom he will make lease of public school lands, *quære*.
2. **Judicial Sales:** BIDDING, AGREEMENTS IN REGARD TO. An agreement, by which one bidder was to bid on two tracts and one of them for another party who was present, and the latter was to take the lease if the land was secured under the bid, is not necessarily against public policy where the whole transaction was not intended to, and did not in fact, have the effect to chill bidding, and was known to the officers conducting the leasing.

ERROR from the district court for Lancaster county.
Tried below before CORNISH, J. *Affirmed*.

Albert W. Crites, for plaintiff in error.

F. N. Prout, Attorney General, *Norris Brown*, Deputy,
and *Doyle & Berge*, contra.

The agreement made by the parties at the sale relative to bidding was a proper one for them to enter into. *Olson v. Lamb*, 56 Neb., 104; *Gulick v. Webb*, 41 Neb., 706; *Hunt v. Elliott*, 41 Am. Rep. [Ind.], 794; *Jenkins v. Frink*, 30 Cal., 586; *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq., 159; *Marie v. Garrison*, 83 N. Y., 14; *Hopkins v. Ensign*, 25 N. E. Rep. [N. Y.], 306; *Breslin v. Brown*, 24 Ohio St., 565.

HASTINGS, C.

This was an application for a mandamus in the district court for Lancaster county. The relator alleges that he was a citizen and resident of Dawes county, Nebraska, and not

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the owner or lessee of school lands of the state in excess of the prescribed amount, and that at a public leasing of school lands in that county, the east half of the west half and the west half of the east half of section 16, township 29, range 49, was awarded to him at the semi-annual rental of \$11.93; that he tendered payment and demanded a lease and the land commissioner directed him to make application to the county treasurer of Dawes county, and stated that the land would be awarded to him by the board of public lands and buildings in due season and that when notified by the county treasurer, relator might make the required payment, which he has ever since been ready to do; but on the same day, before relator could make application, one William Hollinrake applied to the county treasurer for a lease of the land and tendered the money for it, which was received; that relator was told to come a few days later and when he returned he was informed of the Hollinrake application and that the same had been forwarded to the land commissioner; that the relator protested against such action and at once demanded his lease which was not made but one was made to Hollinrake; that the land commissioner and the county treasurer had full knowledge and notice of relator's rights in the premises, and that the land commissioner, under pretext of carrying out an agreement between relator and Hollinrake, refused to execute or deliver any lease to relator and subsequently did make a lease to Hollinrake; that a demand in writing served upon J. V. Wolfe, as commissioner, was on file in the office of the respondent, but in violation of relator's rights a lease of the premises to Hollinrake was executed on March 20, 1901; that the relator has no adequate remedy at law and he asks a mandamus to compel the execution of a lease to him.

Hollinrake was permitted to intervene and answered alleging that the court had no jurisdiction to issue a mandamus; that the board of educational lands and funds of the state of Nebraska has exclusive original jurisdiction of the matter of leasing school lands and that the plaintiff's

petition did not state a cause of action; he also set out that he himself was a competent bidder at the leasing; that he was the highest bidder for the premises in question; that his bid was recorded as provided and his application duly made and the lease properly awarded to him and that his action in leasing said premises and paying his money therefor, was at the relator's suggestion and direction. The respondent Follmer answered, admitting the relator's citizenship, admitting his own incumbency as commissioner of public lands and buildings; admitting the public leasing of lands in Dawes county and alleging that the then land commissioner, Wolfe, offered these premises and other lands and they were struck off to the relator; that at that time the relator stated that as to this 320 acres in question the bid was for the benefit of William Hollinrake, who was there in person directing the bid; that directions were given to him at that time that this land in question should be leased to William Hollinrake upon the latter's making application for it and paying the amount bid. That William Hollinrake carried out the arrangements and in due course of business in the office a lease was made to Hollinrake for the 320 acres, and upon due application the other land was leased to the relator according to the arrangements made at the time of the bid.

The court found the issues in favor of the respondent and dismissed the relator's application. The relator concedes in his brief that the evidence as to what took place at the time of the bid is conflicting and that one version of it supports the finding. His contention, however, is that the facts set out and found by the court do not amount to a defense for the reason, as he claims, that any such arrangement between the relator and Hollinrake would be contrary to public policy and the land commissioner had no right to carry it out if it was made. Respondent contends that there was nothing against public policy in the arrangement; that the bid being by the relator made in pursuance of the arrangement and so stated at the time, if it was against public policy, it deprives the relator of

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any claim under it, and third, that the relator's remedy is not by mandamus in any event but by a proceeding to review the action of the board of educational lands and funds in awarding the lease to Hollinrake.

In *State v. Scott*, 17 Neb., at page 688, cited to the effect that error proceedings will lie from the action of the board of educational lands and funds to the district court, such seems to be the holding in that case. If this is true, it would seem that the relator would have a plain and adequate remedy in the ordinary course of law, in which case, by section 646 of the Code of Civil Procedure, no mandamus would be allowed to issue. That a right of review by appeal or error prevents mandamus, has been frequently held by this court. *State v. Cornell*, 54 Neb., 158; *State v. Babcock*, 22 Neb., at page 47; *State v. Merrell*, 43 Neb., 575; *State v. Kinkaid*, 23 Neb., 641.

It is, however, hardly necessary to pass upon this point. It would seem that there is nothing in the doctrine of public policy, which would forbid an intending purchaser of one piece of land, on his own behalf, from bidding for another piece immediately contiguous on behalf of another purchaser, who was then present and directing the bids, where the whole transaction is openly done in the presence and with the knowledge of the officer conducting the sale. This is especially true where, as in this instance, the officer is not bound to accept any bid. The land commissioner is only to make the lease if he finds it is for the best interests of the state, otherwise he may pass the land without leasing. Section 15, chapter 80, Compiled Statutes [Annotated Statutes, section 9874]. That the officers had full knowledge of the arrangement at the time is manifest from Hollinrake's application being first and the bid being entered as his and before the actual leasing his protest was entered.

If the facts of this sale were as found by the district court there seems to have been no valid legal objection to the awarding of the lease by the board of educational lands and funds to Hollinrake, and that the contention

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that such action was unlawful is without merit. It being conceded by the relator that there is evidence to support the finding of the trial court as to the character of the transaction, it must be permitted to stand.

It is recommended that the judgment of the district court be affirmed.

KIRKPATRICK and LOBINGIER, CC., concur.

AFFIRMED.

FRANK K. DEXTER V. THE CITIZENS NATIONAL BANK OF
NORFOLK, NEBRASKA.

FILED APRIL 9, 1903. No. 12,070.

Commissioner's opinion. Department No. 3.

Vendor and Purchaser: FRAUDS, STATUTE OF: MORTGAGE FOR PRE-EXISTING DEBT: PRIORITIES. A vendee in good faith and for a valid and sufficient consideration of chattels which are left in the possession of the vendor under such circumstances as to satisfy the requirements of the statute of frauds, has a right superior to that of a creditor who subsequently obtains them in pledge to secure the payment of a pre-existing debt.

ERROR from the district court for Madison county.
Tried below before CONES, J. *Reversed.*

Powers & Hays, for plaintiff in error.

A mortgage of goods which the mortgagor does not own at the time, though he may afterwards acquire them, is void as to such goods, as against subsequent purchasers, or attaching creditors. *Jones, Chattel Mortgages* [4th ed.], sections 138, 154; *Case v. Fish*, 15 N. W. Rep. [Wis.], 808; *Chapman v. Weisner and Steinbacher*, 4 Ohio St., 481; *Long v. Hines*, 19 Pac. Rep. [Kan.], 796; *Moody v. Wright*, 13 Met. [Mass.], 17; 1 Cobbey, *Chattel Mortgages*, section 359; *Standard Brewery Co. v. Nudelman*, 70 Ill. App., 356; *Brunswick-Balke-Collender Co. v. Stevenson*, 4 N. Y. Supp., 123; *Armstrong v. Ford*, 38 Pac. Rep. [Wash.], 866; *Fishback v. Van Dusen*, 22 N. W. Rep.

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[Minn.], 244; *Robinson v. Elliott*, 22 Wall. [U. S.], 513; *Cole v. Kerr*, 19 Neb., at page 555; *Steele v. Ashenfelter*, 40 Neb., 770; *Wedgewood v. Bank*, 29 Neb., 165.

The bank's mortgage was never recorded, so, under the statute, it could not be foreclosed. *Lehman-Higginson Grocer Co. v. McClain*, 64 Pac. Rep. [Kan.], 1029.

The mortgage contained no provision for selling and applying the proceeds of the sale of the mortgaged property to the satisfaction of the debt, and it does not appear that the money from the sales was so applied. *Buckstaff Bros. Mfg. Co. v. Snyder*, 54 Neb., 538; *Lepin v. Coon*, 54 Neb., 664.

W. M. Robertson, contra.

The mortgage was valid as between the parties. 1 Cobbey, Chattel Mortgages, section 355; *Earle v. Burch*, 21 Neb., 702; *Conchman v. Wright*, 8 Neb., 1; *The American Cigar Co. v. Foster*, 36 Mich., 368.

One who acquires title to mortgaged property by contract with the mortgagor, or his vendee, after the execution of the mortgage, and without notice thereof, is a "subsequent purchaser in good faith." *Farmers & Merchants Bank v. Anthony*, 39 Neb., 343; 2 Cobbey, Chattel Mortgages, section 611.

One who purchases personal property with knowledge of a prior unrecorded mortgage thereon, takes subject to the lien created by such mortgage. *Wagner v. Steffin*, 38 Neb., 392; *Railsback, Mitchell & Co. v. Patton*, 34 Neb., 490; *The American Cigar Co. v. Foster*, 36 Mich., 368.

If the lien of the mortgage did not attach prior thereto, it attached at the time the mortgagor turned the property covered by the mortgage over to the mortgagee. *Cole v. Kerr*, 19 Neb., 553; 1 Cobbey, Chattel Mortgages, sections 348, 357-359.

AMES, C.

The Norfolk Nebraska Produce Commission Company, a corporation, was doing business at Norfolk, Nebraska.

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On the 11th day of October, 1895, it executed and delivered to the defendant bank a chattel mortgage which has never been put upon the county records. The instrument described certain property specifically, and contained in addition to such description the following clause: "Said mortgage is intended to cover all merchandise and personal property of every kind, now in said cold storage building, and that may be therein at the time possession may be taken or sought by the mortgagee, its successor or assigns." After the execution of the mortgage the company purchased and put in the building two hundred barrels of apples. Afterwards, also, the company became indebted to Mrs. Lucina H. Dexter, who was the wife of the plaintiff, then vice-president of the company. In January, 1897, Mrs. Dexter accepted the apples in part payment and was paid the residue of her demand in cash. At and previous to that time she had knowledge of the existence and terms of the mortgage. The apples remained in the custody and possession of the company, except about forty barrels of them were sold for Mrs. Dexter's account by her husband, the plaintiff, as her agent. In February following the company turned over all its property, including the unsold residue of the apples, to the bank, to be sold for the payment of its indebtedness to the latter. The plaintiff participated in the delivery of the property and in an agreement then made that the bank should dispose of it at private sale for the purpose above mentioned. At this time the bank had no knowledge of the sale to Mrs. Dexter. A short time after this last transaction, the plaintiff, as the agent of his wife, demanded of the bank the possession of the apples as being her property. The demand was refused and shortly afterwards he begun this action, as the assignee of his wife of her claim, for a conversion of the fruit. A trial resulted in a verdict and judgment for the defendant, a reversal of which is sought by this proceeding.

The mortgage to the bank, in so far as it sought to affect after acquired property, was a nullity. *New Lincoln*

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Hotel Co. v. Shears, 57 Neb., 478; *Battle Creek Valley Bank v. First National Bank*, 62 Neb., 825, 88 N. W. Rep., 145. It therefore created no lien or charge upon the apples even as between the parties. The sale of the apples to Mrs. Dexter was valid as between the parties, because it rested upon a valid consideration and was evidenced by an actual delivery of a part of the property so as to exempt it from the operation of the statute of frauds. Because there was no change of possession it was void by statute as to the creditors of the vendor, but according to a multitude of decisions by this court the word "creditor" in this connection means one who has seized the property by judicial process. The bank does not come within this description. It was by the same statute void as to subsequent purchasers in good faith. But we think the bank was not a purchaser in good faith within the meaning of the statute. It acquired the goods, not for a present consideration, nor by judicial process, nor by virtue of a valid nor, indeed, any mortgage upon them, nor even in payment of all or any portion of any demand in its behalf, but by way of pledge for the purpose of selling them and applying the proceeds towards the payment of a pre-existing indebtedness. The title to the property was, with the exceptions named in the statute, in Mrs. Dexter, and we think the case falls within the principle of *Tootle v. First National Bank*, 34 Neb., 863. In that case one Yates had purchased and obtained the possession of certain merchandise from the plaintiff under circumstances entitling the latter to rescind the sale and recover the goods. Yates mortgaged the goods to secure a pre-existing debt to the bank, which was ignorant of the fraud affecting his title. The mortgagee took possession and the vendor of Yates brought replevin. It was held that the bank, having parted with no present value, was not a *bona fide* purchaser for value, and the plaintiff recovered. The only difference between that case and this is, that Yates had acquired a title to the merchandise defeasible at the option of his vendor, while in this case Mrs. Dexter had

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acquired a title to the apples not defeasible by her vendor, by any means, without her consent. It is not necessary to inquire whether if the plaintiff had been the purchaser of the apples, he would have been estopped from claiming them by his participation in the delivery of them to the bank. His wife is not charged with such participation and he succeeded to her right. The facts are undisputed and are insufficient to support the verdict and judgment.

It is recommended that the judgment of the district court be reversed and a new trial awarded.

DUFFIE and ALBERT, CC., concur.

REVERSED AND REMANDED.

MERCHANTS & MANUFACTURERS MUTUAL INSURANCE COMPANY V. FILMORE H. BAKER.

FILED APRIL 9, 1903. No. 12,424.

Commissioner's opinion. Department No. 2.

1. Insurance: ASSESSMENTS: NON-PAYMENT: CANCELLATION OF POLICY.

A mutual insurance company may suspend or cancel a policy of insurance, issued to one of its members, for non-payment of an assessment or premium where its by-laws and the policy provide for such action.

2. Insurance: PRINCIPAL AND AGENT: PAYMENT TO AGENT: CANCELLATION OF POLICY.

Where a policy is issued and sent to a soliciting agent who has only limited power to bind the company, to be delivered by him to the insured, and is accompanied by a statement of the amount due as the advance assessment or premium, which is not remitted, the company may cancel the policy, after due notice of the fact of non-payment and of its intention to do so has been given to the agent and the assured, notwithstanding such agent, without its knowledge, may have money in his hands belonging to the assured out of which he had agreed to pay the premium.

3. Insurance: CANCELLATION: REINSTATEMENT AFTER LOSS.

When the policy has been canceled and notice of that fact has been given to the assured and the agent, and a considerable time there-

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after the building described therein is destroyed by fire, the company cannot be compelled to accept payment of the premium, reinstate the policy and thus render itself liable for the loss.

ERROR from the district court for Lancaster county. Tried below before FROST, J. *Reversed.*

Tibbets Bros., Morey & Anderson, for plaintiff in error.

Geo. A. Adams, contra.

BARNES, C.

The plaintiff herein prosecutes error from a judgment of the district court for Lancaster county, in a suit wherein the plaintiff was defendant and the defendant in error was the plaintiff. The defendant brought suit against the plaintiff on an insurance policy to recover the sum of \$500 alleged to have been his loss sustained by the accidental burning of his building situated in the village of Havelock, which is alleged to have been covered by said insurance policy. The petition declared on the policy in the usual form. The answer contained a denial, and in addition thereto the following:

"The defendant for further answer to said petition alleges and states that the policy of insurance sued on in plaintiff's petition was delivered to the plaintiff upon condition that the plaintiff should pay one-half of the amount of the premium named in said policy, to wit, one-half of \$15, or \$7.50, upon said delivery; that plaintiff failed to pay said premium, and that defendant received no consideration for the issuance and delivery of said policy.

"Defendant further alleges and states that at the time of the fire complained of in plaintiff's petition, and by reason of the failure of plaintiff to pay the premium as required, that said policy was void and of no force and effect; and that a long time prior to the date of said fire the said policy and contract of insurance had been repudiated and canceled by this defendant."

The reply to these matters of defense was a general

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denial. Upon the issues thus joined the cause was tried to a jury and resulted in a verdict and judgment in favor of the defendant herein and against the plaintiff for \$522.65.

But two questions, cancellation and payment, are involved in this controversy. We shall pay no particular attention to the latter question, for the case must be decided on the facts relating to the cancellation of the policy.

It appears from the record and bill of exceptions that for some time prior to the 17th day of March, 1900, the defendant herein and one F. L. Sumpter were engaged in certain lines of business together, as partners, in the village of Havelock, and on that day the partnership was dissolved; an accounting was had between them, and it was found that they owed the sum of \$366.09; that there were due them on that day \$457.75 in the nature of bills receivable, leaving a net balance in their favor of \$91.66; that they had in cash \$169.32, which appears to have been in a box in their safe, and a balance in the bank of \$139.45, making a total cash balance of \$308.77; that they had due them on notes, which had not been paid before that time, \$308.02, which, taken together with the cash and the balance of accounts, gave them as partnership assets, over liabilities, the sum of \$708.45. It further appears that all of these assets were in the hands of F. L. Sumpter, one of the said partners. It also appears that the defendant was preparing to take a trip to Arkansas, with a possible view of remaining there; that on the 20th of the month, being about to leave, he took \$20 in cash out of the money box, and said to Sumpter, who was the soliciting agent of the insurance company, that he believed he ought to have his building insured. This was assented to by Sumpter, who told him that it would be necessary for him to sign an application. Sumpter thereupon produced a blank application, which was signed by the defendant, who told Sumpter to procure the insurance for him. It appears that the rate was discussed, and Sumpter told defendant that the premium required would be \$10. It is shown that the

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\$10 was never segregated from the balance of the fund in the hands of Sumpter; that no manual payment of it, or any other sum, was ever made by Sumpter to the company.

It was further shown on the trial that the application signed by the defendant was not placed before the officers of the insurance company until the 5th day of May; that it was then approved, and the policy of insurance in question herein was issued and sent to Sumpter to be delivered by him to the defendant on that day. Accompanying said policy was a statement or bill for the amount of premium then due, to wit, the sum of \$7.50. The money was never paid to the company and, as Sumpter says, he overlooked it. On the 26th of May, 1900, the company notified the defendant by letter, duly mailed and addressed to his usual place of residence, that his premium or assessment had not been paid, and in order to continue his policy in force, such payment must be made on or before the 5th of June following; Sumpter was also notified of said facts. On the 6th of June the amount of the assessment or premium not having been paid, and the company having heard nothing from Sumpter or the defendant, it canceled the policy upon its books and gave the defendant notice of that fact by a letter duly mailed to his address at his place of residence, where his family still lived. Nothing more was done about the matter and nothing further was heard of it until the 4th day of July following, when the building was burned. After the fire occurred, and on the 14th of July, Sumpter sent a draft for \$5.25 to the company, which was returned to him with the following letter:

"Mr. F. L. Sumpter, Havclock, Neb.

"DEAR SIR: Your favor of the 14th received inclosing draft for \$5.25 which I return herewith. Policy No. 3188 issued to F. H. Baker on May 5, 1900, was suspended on June 6, 1900, for non-payment of premium. Mr. Baker was notified to that effect, and the notification was on file in your office, a copy of which is recorded in this

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office. Mr. Baker was notified on May 25, that his premium would fall due and payable on June 5, and notice of the premium was also sent with the policy. I beg to have you call Mr. Baker's attention to section 12, 1897, Nebraska Insurance Law, under which this company organized; also article 10 of our by-laws, inclosed herewith, a copy of which is on our policies.

"I regret very much that this has occurred, but trust you see our position in the matter. I beg to remain,

"Yours very respectfully,

"E. F. PHILBROOK, JR.,

"Supt. of Agents."

The first notice the plaintiff ever had that it was claimed that the premium had been paid to the agent Sumpter, was after the fire occurred. Sumpter was a mere soliciting agent without general powers; that he had no authority to make contracts of insurance cannot be questioned. *Farmers & Merchants Insurance Co. v. Graham*, 50 Neb., 818.

It must be observed that this insurance company is a mutual concern; that its policy could only be obtained by making the proper application, paying the advance premium or assessment, and becoming one of its members. Whoever becomes a member of a mutual insurance company is bound by all of the by-laws, rules and regulations thereof. One of the by-laws of this company was, that the policy of insurance should be suspended, and the company should not be liable thereon at any time when the defendant was in default for the payment of his assessments. If the premium was not paid, the policy could be suspended or canceled and no recovery could be had thereon. The company repeatedly called attention to the fact that the premium had not been paid, and Sumpter, with whom the defendant herein had left his moneys in the expectation that he would pay the premium out of them, paid no attention to the letters of the company calling his attention to the matter. Having called

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upon both Sumpter and the defendant for the premium and receiving no satisfaction the company finally canceled the policy, as it had a right to do under its express terms, and notified the defendant of such cancellation by a letter addressed to him at his usual place of residence, and which, so far as appears, was duly received by him, in which it gave the express reason for the cancellation, that the premium remained unpaid. It appears also that Sumpter was duly notified of this fact. The loss occurred about thirty days after the policy was canceled, and the company pleads and relies on such cancellation as its defense. It clearly appears that the cancellation was complete. What further was necessary? The company did not have defendant's money, neither did the company's agent have it. The money remained where he had put it subject to his order, and after repeated notifications that the premium was due, it still remained there. No attempt was made to get it into the hands of the company until after the loss, and the company is not chargeable with knowledge of what Sumpter knew because Sumpter was not authorized to issue policies, and had only limited powers. The policy having been canceled the company could not be required, after a loss had occurred, to accept the premium and reinstate the policy and thus make itself liable for such loss.

For the foregoing reasons we recommend that the judgment of the district court be reversed, and the cause remanded for further proceedings.

POUND and OLDEHAM, CC., concur.

REVERSED AND REMANDED.

Stedry v. Beck.

V. J. STEDRY V. ALBERT BECK, ADMINISTRATOR OF THE
ESTATE OF WENCIL BECK, DECEASED.

FILED APRIL 9, 1903. No. 12,553.

Commissioner's opinion. Department No. 3.

1. **Appeal and Error: RECORD MUST SHOW AFFIRMATIVE ERROR.** To warrant a reversal of a judgment of the district court, reversing an order of the county court, error must affirmatively appear.
2. **Appeal and Error: RECORD INCOMPLETE: PRESUMPTIONS.** If the record presented to this court in such case is not complete, and if, because of such incompleteness, it is impossible to determine whether the judgment of the district court is right or wrong, it will be presumed to be right.

ERROR from the district court for Saline county. Tried below before STUBBS, J. *Affirmed.*

F. W. Bartos and Mockett & Polk, for plaintiff in error.

J. H. Grimm & Son, contra.

ALBERT, C.

The plaintiff in error asks the reversal of a judgment of the district court reversing an order of the county court allowing a claim against the estate of which the defendant in error is administrator.

Much of the brief filed on behalf of the plaintiff in error is devoted to a discussion of the propositions that error will not lie from a judgment by default; that the defendant should have applied to the county court for a vacation of the order complained of and that an administrator, as such, cannot maintain error from an order of the county court allowing a claim against the estate. Those propositions were advanced in *Herman v. Beck*, — Neb., —, 94 N. W. Rep., 512, in which an opinion was filed this term. In that opinion the propositions stated were held untenable. What is there said applies to the present case, and it is unnecessary to reiterate it.

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It is next urged that no bill of exceptions was preserved in the county court and that the errors relied upon do not affirmatively appear on the face of the record of the county court, consequently the district court erred in reversing the order. There would be much force in this contention were the entire record upon which the district court acted, before us. We cannot presume that it is. The certificate of the clerk of the district court to the transcript, omitting the formal parts, is "that the foregoing is a true and complete transcript of the petition in error and all the papers attached thereto, motion of the defendant in error, copy of the proceedings of the court on the hearing of said cause at the October, A. D., 1901, term of this court and the supersedeas bond filed in the said case, all of which appear of record and on file in my office."

From the foregoing certificate, it does not appear that the transcript is of the complete record nor that the transcript of the county court is incorporated into it. It cannot be claimed that such transcript is embraced in the language "and all papers attached thereto," because there is nothing to show that any papers were attached to the petition in error in the district court, nor does such petition refer to any papers attached to it. Such being the case, we are in the dark as to the reasons which moved the district court to reverse the order of the county court, consequently it will be presumed that they were good and sufficient. *Yeatman v. Yeatman*, 35 Neb., 420.

It is recommended that the judgment of the district court be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

Mansinger v. Steiner-Medinger Co.

PHILIP MANSINGER V. STEINER-MEDINGER COMPANY.

FILED APRIL 9, 1903. No. 12,608.

Commissioner's opinion. Department No. 1.

1. Sales: TITLE: VALIDITY. It is essential to a valid sale that the party purporting to sell should have title to the subject-matter.
2. Sales: CONTRACTS OF: EVIDENCE. An instrument signed by two parties reciting that one has sold to the other property, the title to which is shown by extrinsic proof to be at the time in the latter, is not conclusive evidence of a contract of sale.

ERROR from the district court for Douglas county. Tried below before KEYSOR, J. *Reversed.*

Weaver & Giller, for plaintiff in error.

O'Neill & Gilbert, *contra.*

LOBINGIER, C.

This is an action of replevin for a quantity of flour which had been sold by plaintiff to the defendant in that action in August, 1899. It is undisputed that the title passed to the vendee as the result of this sale and that he was given time for payment. The purchase price was not paid, at least not in full, and on September 15, following, an instrument was signed by defendant and also by plaintiff below through its representative, Medinger. We append a literal copy:

"OMAHA, NEB., Sept. 15, '99.

"Ex. 2. J. W. B.

"M.....

"Ex. 1.

"In account with IMPERIAL MILLING AND COMMISSION CO.

"Wholesale Dealers in

"Flour, Feed, Provisions, Butter and Eggs.

"Phone..... 618 So. 16th Street.

"Sept. 15, '99.

"To whom it may concern

"this is to show that the Imperial Mills party of the first part has sold P. P. Mansinger 35000 99 Flour c \$170

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30000 Purity Flour at \$142 on the following conditions that the party of the second part agrees to pay to the party of the first part every Saturday for the Flour used each week until it is all paid for and should the party of the second part fail to fulfill this contract then this contract to become null and void.

"Commission

PHILIP MANSINGER

"Drayage

STEINER-MEDINGER CO.

"Exchange

"Balance."

The instrument was prepared in advance by Medinger or some one with him other than plaintiff, but there is no evidence as to what the negotiations were, if any, which led up to its execution. Plaintiff's cause of action is based on this instrument alone and the court gave the following instructions, which were duly excepted to:

"3. The jury are instructed that the written instrument received in evidence and marked 'Exhibit 1,' is conclusive evidence of a conditional sale of the flour in controversy by the plaintiff to the defendant, and that a failure on the part of the defendant to make payments for said flour according to the terms of said instrument gives the plaintiff under said instrument the right to declare said sale void.

"4. If you believe from a preponderance of the evidence that at the time of the replevin of the flour in controversy the defendant had not paid for such part thereof as he had used up to and including the preceding Saturday, then your verdict should be for the plaintiff; but if the plaintiff has failed to prove by a preponderance of the evidence that defendant had not paid for the flour he had used up to and including the preceding Saturday, then your verdict should be for the defendant."

The verdict being for plaintiff, defendant prosecutes error.

Defendant in error urges that the instrument above copied "fulfills the definition of a contract of conditional sale." This appears to be true on its face. It might also

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have been true in fact if the title to the flour had really been in "the party of the first part" when the instrument was executed. But "no man can sell goods and convey a valid title to them unless he be the owner, or lawfully represent the owner. *Nemo dat quod non habet.*" Benjamin, Sales [Bennett's ed.], section 6. At the time this instrument was signed the title to the flour was not in the Imperial Mills nor in defendant in error, but in Mansinger, and the former had nothing to convey. The author above quoted states as one of the essentials of a valid sale: "A thing, the absolute or general property in which is transferred from the seller to the buyer." Benjamin, Sales [Bennett's ed.], section 1. Surely no "absolute or general property" in this flour was transferred from defendant in error to Mansinger by this instrument, because so far as appears the former had no such property to transfer and the latter had the entire interest. It is true that the instrument refers to itself as a "contract," but merely labeling it a contract will not make it such if it lack the legal essentials. No more is it sufficient to recite that this was a sale on condition, if in fact it transfers no title and is without the requisites of a sale. Counsel for defendant in error claim that "by entering into this contract, the absolute sale was changed into a conditional one, and, as a matter of fact, the title to the flour was placed back in Steiner-Medinger Company by an agreement of the parties." But we see nothing in this instrument to indicate that the title was ever "placed back in Steiner-Medinger Company." Nor is there any external evidence of a resale to it. On the contrary it seems to be conceded that on September 15, when the instrument was executed, the title was still in Mansinger. In the light of these conceded facts we cannot approve the charge that "this instrument is conclusive evidence of a conditional sale." What the instrument actually was (if indeed it conferred any legal rights whatever) we are not called upon to determine, but that it neither divested Mansinger's title nor transferred a different one to him appears unquestionable.

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Counsel further urge: "There is no difficulty in finding a consideration for this contract. If the thirty days' credit had expired, then the extension of the time of payment was a sufficient consideration for the change. If the thirty days' credit had not expired, the same consideration appears, for the time of payment was nevertheless extended." If this instrument does not in fact evidence a sale, the question of consideration would not be material. But it is doubtful if the consideration here suggested by counsel would afford a sufficient basis for a contract of sale. As was said in *Williamson v. Berry*, 8 How. Pr. [U. S.], 544:

"Sale is a word of precise legal import, both at law and in equity. It means at all times, a contract between parties, to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold. Noy's Maxims, chapter 42; Shepard's Touchstone of Common Assurances, 244."

"To sell property is, in the strict signification of the word 'sell,' to transfer it from one to another, in consideration of a price paid or agreed to be paid in current money." *Commonwealth v. Davis*, 12 Bush [Ky.], at page 241. See, also, *Bigely v. Risher & Wilson*, 63 Pa. St., at page 154; *Massey v. State*, 74 Ind., 368. Even where the consideration is not money it seems that there must be a fixed money price. *Schenck v. Saunders*, 13 Gray [Mass.], at page 41; *Picard v. McCormick*, 11 Mich., at page 77.

We recommend that the judgment be reversed and the cause remanded for further proceedings.

HASTINGS and KIRKPATRICK, CC., concur.

REVERSED AND REMANDED.

U. P. Steam Baking Co. v. Omaha Street R. Co.

U. P. STEAM BAKING COMPANY v. OMAHA STREET RAIL-
WAY COMPANY.

FILED APRIL 9, 1903. No. 12,615.

Commissioner's opinion. Department No. 2.

1. **Trial: DIRECTING VERDICT: EVIDENCE.** A trial court should not instruct a jury to return a verdict for either party where, under the evidence, there is any doubt about the propriety of such action; but where the duty to do so is plain it should be performed without hesitation.
2. **Street Railroads: DAMAGES: EVIDENCE INSUFFICIENT.** Evidence examined, and *held* that a verdict for the plaintiff could not have been sustained in this case on any theory.
3. **Appeal and Error: INSTRUCTIONS: VERDICT: ONLY ONE POSSIBLE.** In a case where a verdict is returned for the defendant, and is the only one which can be sustained, errors assigned by the plaintiff on account of giving and refusing instructions will not be considered.
4. **Trial. CROSS-EXAMINATION OF WITNESS: RESTRICTION OF: EVIDENCE.** Bill of exceptions examined, and *held* that the court did not err in restricting the cross-examination of a witness, and in striking out a part of such cross-examination.

ERROR from the district court for Douglas county. Tried below before KEYSOR, J. *Affirmed.*

B. N. Robertson, for plaintiff in error.

John L. Webster, contra.

BARNES, C.

This action was originally commenced before a justice of the peace in Douglas county by the plaintiff in error to recover from the Omaha Street Railway Company the sum of \$198.75, damages alleged to have been sustained by the plaintiff on account of the negligence of the defendant by which a collision occurred between one of the defendant's street cars and the plaintiff's bakery wagon. The trial in the justice court resulted in a verdict and judgment for the defendant, from which the plaintiff ap-

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pealed to the district court, where the cause was again tried and the jury again returned a verdict for the defendant. From a judgment thereon the plaintiff prosecutes error to this court.

It appears that on the 12th day of January, 1899, one Henry Marquardt was in the employ of the plaintiff as driver of one of its bakery wagons, used to deliver its products to its various customers throughout the city of Omaha and in Council Bluffs. Marquardt testified on the trial, in substance, that on the morning in question at about half past four o'clock he harnessed the plaintiff's team of horses and hitched them to its bakery wagon and when ready started on his regular delivery trip; that the morning was very dark and foggy, but was not very cold; that he started from a point in the north part of the city of Omaha, drove to North 24th street, and from that street he turned and drove down Spencer street east to its intersection with Sherman avenue, or 16th street; that on the last named street defendant was operating its line of street cars on two tracks, or what is commonly called a double track; that said street ran north and south and the cars operated thereon, going north, ran on the east track and those going south ran on the west track of the street railway; that he reached Sherman avenue a little before six o'clock; that he saw a street car going south on that street just before he reached it and that he turned from Spencer street on to Sherman avenue and drove south thereon for a distance of something over half a mile before the accident occurred; that he drove on the street car track because there was ice and snow on the street between the car track and the curb, and that he drove all of the way on the west track of the street car line; that the bakery wagon, in which he was riding, had an enclosed top so that he could not look back and see an object approaching from behind without opening the side door and putting his head out in order to enable him to look back; that the only opening in the top of the wagon was in front, and that he could look out that way and

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see how to drive, and see objects approaching from that direction; that he pushed open the side door and looked out once when about a block from where the accident occurred, to see if a car was approaching from behind, and then closed it again; that he expected a car to come from behind and listened for it but did not hear one coming, or any alarm denoting the approach of a car; that he kept right on driving on the west track all of the time with his horses on the trot and the first thing he knew, when about one hundred feet from Burdett street, the hind end of the wagon was struck by a car approaching from that direction; that the wagon was pushed off from the track but was not overturned; that one of the horses was thrown down and that he opened the side door of the wagon, got out and helped the conductor and motorman to get the horse up; that he noticed an electric arc light burning at the Burdette street crossing. He further gave evidence as to the extent of the damages. With the exception of certain evidence tending to show that the street between the car tracks and the curb was partly impassible on account of ice and snow, the foregoing was the plaintiff's case.

At the close of the plaintiff's evidence the defendant requested the court to direct the jury to return a verdict in its favor, and it seems the request should have been granted. The evidence does not directly show any negligence on defendant's part, although negligence may be inferred from the fact of the collision; yet plaintiff's evidence clearly establishes contributory negligence on the part of its driver. He knew that cars were running every few moments on the defendant's track on the street where the accident occurred, and yet he, without any regard for his own safety and without any care for plaintiff's property, drove on the west track of the street car line for more than half a mile, shut up in the closed top of the bakery wagon, unable to look back without opening the side door and putting his head out for that purpose, and, as he says himself, without looking back but once in

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the whole trip when he knew and expected that cars were approaching from behind on that track. He also knew the condition of the weather and the difficulty of seeing objects on account of the darkness and thickness of the fog, and it would seem that he must have known that such conduct on his part would be likely to result in a collision. Plaintiff's counsel, anticipating trouble on that score, introduced evidence tending to show that it was necessary to drive on the street car tracks because of the impassible condition of the rest of the street, rendered so by the act of the defendant. For the purpose of this hearing it may be conceded that such a condition existed; yet the driver knew that he could use the east track just as well as the west one, and that by so doing he could look out in front through the opening in the top of his wagon, and not only see how and where to drive but it would be impossible for him not to see a car approaching him from the front, on that track, in ample time to turn aside and avoid a collision; while a car approaching from behind on the other track would pass him without difficulty.

After a denial of the defendant's request it introduced its evidence. A cloud of competent disinterested witnesses testified that at the time of the accident there was no ice or snow on Sherman avenue. The defendant's motorman was then called and testified, in substance, that on the morning in question he left the street car barn in the north part of the city with his train, consisting of one motor car and trailer; that the morning was very dark and foggy, so much so that one could not see the electric headlight of a street car more than thirty or forty feet, and for that reason he ran the cars slower than his usual rate of speed, and was nearly two minutes behind his usual time at the place where the accident occurred; that he was very careful to, and did, sound the bell or gong at every crossing as he came down the avenue; that he kept a sharp lookout ahead for obstructions on the track; that he could not, and did not, see the plaintiff's

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wagon until within about thirty-five feet of it; that when first seen, it looked like some dark object, and appeared to him as though it was standing still; that when he saw it he instantly sounded the gong, with his foot, as a danger signal, put on the brake with his right hand and reversed the electric current with his left; that he did everything which could be done to stop the car and avoid a collision, but could not stop short of fifty feet; that his car struck the back end of the wagon and bent the brake rod so he could not release the brake; that the car pushed the wagon off from the track; that one of the horses fell down and that he, with the help of the conductor, was trying to get it up when the driver opened the side door of the wagon and got out; that he said to the driver, "What was you doing? Were you asleep?" And the answer was, "You said so." This evidence was fully corroborated by the conductor of the train; and one of the defendant's shopmen testified that he found the brake on the car set and the rod bent so that it could not be released without taking the car to the shops; that it was set in such a manner as to produce the best stop that could be made. None of this testimony was disputed, and on these matters there was no conflict of evidence.

At the close of the trial counsel for the defendant again requested the court to direct the jury to return a verdict for his client, and the request was again refused. The cause was then submitted on the evidence and the instructions of the court and the jury returned a verdict for the defendant.

There can be no doubt but that the court ought to have granted the defendant's request. Its evidence completely destroyed any presumption or inference of negligence which might have arisen on account of the collision. There was no evidence of any negligence on the part of the defendant, and about this there was no chance for reasonable minds to differ. A court should not direct a verdict where there is any doubt about the propriety of so doing; but in a case like this one where its duty is plain it should do so without hesitation.

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It is contended, however, that the court erred in giving certain instructions on his own motion and refusing to give to the jury certain of the plaintiff's requests. Holding, as we do in this case, that the court should have directed a verdict for the defendant, giving or refusing to give any other instructions was not reversible error.

It is further contended that the court erred in restricting the cross-examination of the witness Clayton, and in striking out a portion of his evidence. It appears that Clayton had testified that there was no ice or snow on Sherman avenue. On cross-examination counsel for plaintiff showed the witness an article published in *The Omaha Bee*, entitled "Street Cleaning Begins," and asked him if he recalled the condition of the streets along the street car track on Sherman avenue in the vicinity of the collision on January 12, 1899. To this the witness answered, "No, sir; I do not." His attention was then called to another item therein, headed "Stops Street Cleaning," and the same question was repeated. This was objected to by the defendant, the objection was sustained, and on motion of counsel the other question and answer was stricken out. The ruling of the court was right. The whole matter was immaterial, because the witness stated that his recollection was in no manner aided by the newspaper articles, and the record should not be incumbered with it. Again, the witness did not make the record (that is to say the newspaper articles), and so far as it appears he knew nothing about their reliability, and had no information as to whether they were true or false. The practice of attempting to refresh the recollection of a witness, or to try cases on ordinary newspaper articles, is not to be commended by the courts. It was suggested on the hearing that this case is an important one, not on account of the amount involved, but because the relative legal rights of the street car company and the inhabitants of the city in the use of the streets ought to be settled. We concede that a settlement of this matter is very desirable, and we will cheerfully perform that duty when a case comes before us re-

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quiring such a decision; but we should not determine this question in a case where a judgment in favor of the defendant was the only one which could have been sustained.

For these reasons we recommend that the judgment of the district court be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

JOSEPH STANDLEY V. CLAY, ROBINSON AND COMPANY.

FILED APRIL 9, 1903. No. 12,616.

Commissioner's opinion. Department No. 3.

Pleading: WAIVER OF OBJECTIONS: PRINCIPAL AND AGENT: EVIDENCE OF AGENCY.

ERROR from the district court for Douglas county. Tried below before BAXTER, J. *Affirmed.*

E. G. McGilton and Prigg & Williams, for plaintiff in error.

Crofoot & Scott, contra.

AMES, C.

This is a companion case to *Standley v. Clay, Robinson and Co.*, — Neb., —, 94 N. W. Rep., 140, and presents the same questions for review. Those questions are considered in an opinion filed in the latter case at the present term and it is unnecessary to reiterate what is there said.

It is recommended that the judgment of the district court be affirmed.

ALBERT and DUFFIE, CC., concur.

AFFIRMED.

Brockway v. Humphrey.

HORACE BROCKWAY V. SETH K. HUMPHREY.

FILED APRIL 9, 1903. No. 12,687.

Commissioner's opinion. Department No. 2.

Taxation: FORECLOSURE: SURPLUS: RIGHTS OF FIRST MORTGAGEE. Record of proceedings examined, and *held* to show no reversible error.

ERROR from the district court for Dawes county. Tried below before WESTOVER, J. *Affirmed.*

W. W. Wood, for plaintiff in error.

Albert W. Crites, contra.

OLDHAM, C.

This is a proceeding in error to reverse the judgment of the district court for Dawes county, in awarding the surplus arising from a sale of real estate in a proceeding to foreclose a tax lien to the holder of the first mortgage on the land foreclosed. The contest is between the purchaser at the foreclosure sale and the indorsee of the note secured by the mortgage.

The record of the original foreclosure proceedings is not contained in the transcript but, by inference from what is here, it is made to appear that the plaintiff at the tax foreclosure sale was the purchaser and that he also procured a deed to the premises from one Pitman, who held an unrecorded deed to the equity in the land and was himself not a party to the foreclosure proceeding. It would appear that at the former sitting of the court an order had been procured to pay the surplus to Pitman, but that the surplus was in fact never paid either into court or to Pitman, and that the holder of the first mortgage intervened with a petition setting up his indebtedness and the mortgage securing the same and asking that his mortgage be declared a lien on the surplus.

In the motion for a new trial on which the error pro-

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ceeding is founded, even under the most liberal construction, but one issue arises, and that is, the jurisdiction of the district court over the subject-matter of the controversy. Under this condition of the record we see nothing to do but to affirm the judgment of the lower court. Plainly the first mortgagee was entitled to a lien on the surplus and if, as found by the trial court, the order to pay it to Pitman had been made by inadvertence and without Pitman ever having been in court, the plaintiff in the original proceeding is in no position to complain because the court set this order aside. The plain duty of the purchaser at the foreclosure sale was to pay the surplus into court and then step out and leave the holder of the equity and the mortgagee to contest for it if they so desired.

It is therefore recommended that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

PETER ECKMANN ET AL., APPELLEES, V. JOHN E. TURNER,
APPELLANT, ET AL.

FILED APRIL 9, 1903. No. 12,694.

Commissioner's opinion. Department No. 3.

Mortgages: DEED ABSOLUTE ON FACE: EVIDENCE SUFFICIENT. Evidence examined, and *held* sufficient to sustain the decree of the trial court.

APPEAL from the district court for Cuming county.
Tried below before GRAVES, J. *Affirmed.*

P. M. Moodie and W. G. Sears, for appellant.

T. M. Franse, contra.

ALBERT, C.

On the 26th day of April, 1897, Peter Eckmann and his wife executed and delivered to John E. Turner a deed to

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certain real estate in this state. The deed was absolute in form, purporting to convey the entire estate in fee simple. Afterward, and before the commencement of this suit, the grantee entered into a contract with John Carsons to sell and convey the land to him. On the 11th day of October, 1900, the grantors brought this action against Turner and Carsons, alleging in their petition, among other things, that their deed to Turner, though absolute in form, was given and intended by the parties thereto as a mortgage to secure certain indebtedness which Peter Eckmann at the time of the conveyance, owed Turner. They also charged in their petition that certain payments had been made on the indebtedness secured by the instrument in question and asked that an account be taken of the amount due from them to Turner, the cancellation of his contract to Carsons and that they be permitted to redeem upon payment of the amount found due on the mortgage.

Turner answered, denying that the instrument was given or intended as a mortgage. As a further defense, he alleges the amount of the consideration for the conveyance and the payment by him of several incumbrances and charges against the land which existed at and before the date of the conveyance to him, and of the insurance on the buildings. The court found that the conveyance was given and intended as security for a debt, as alleged in the petition, and an account was taken of the amount due thereon. The account includes the original indebtedness the conveyance was given to secure, prior incumbrances and charges against the land discharged by the defendant Turner, and sundry payments made by the plaintiffs. The court found the amount due the said defendant to be \$5,900.89, and entered a decree accordingly. The case is here on appeal.

The defendant, Turner, contends that the finding of the court that the conveyance in question was given and intended as a mortgage, is not sustained by sufficient evidence. We have gone over the evidence on this point and have no hesitation in saying that it is sufficient to sustain the finding.

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Both parties assail the finding as to the amount due; the plaintiffs insisting that the amount is excessive, the defendant, Turner, that it is too small. Each presents a plausible theory which, had the court adopted it in making its computation, would have resulted in a different finding. But the evidence bound the court down to neither of such theories; on the contrary, it is sufficient to sustain a finding of the non-existence of some fact or facts essential to either of them. As the court rejected both, we must conclude that it found that such fact or facts did not exist; consequently, such theories, in the face of such finding, are of no value.

On the other hand, there is ample evidence to establish every fact essential to the soundness of the conclusion reached by the trial court as to the amount due. The evidence as to such facts is voluminous and makes up the greater part of a medium sized bill of exceptions; the rules of law applicable to such facts are elementary, and not a matter of dispute. That being true, it should suffice to say, that the findings of the district court are sufficiently sustained by the evidence.

It is recommended that the decree of the district court be affirmed.

DUFFIE and AMES, CC., concur.

AFFIRMED.

HENRY WILSON V. SARAH J. LYONS.

FILED APRIL 9, 1903. No. 12,702.

Commissioner's opinion. Department No. 3.

Forcible Entry and Detainer: LANDLORD AND TENANT: TITLE. In an action for forcible detainer by a lessor against his lessee holding over his term, the latter cannot be permitted to assert a right of possession under a title paramount and adverse to that of the former.

ERROR from the district court for Clay county. Tried below before STUBBS, J. *Affirmed.*

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J. L. Epperson & Son, for plaintiff in error.

In a forcible detainer case against a tenant, the tenant may show an outstanding title against his landlord where the title of the landlord has expired or has otherwise been extinguished since the creation of the tenancy: 12 Am. & Eng. Ency. Law [1st ed.], 706; *McAusland v. Pundt*, 1 Neb., 211; *Mattis v. Robinson*, 1 Neb., 3; *Jenkinson v. Winans*, 109 Mich., 524, 67 N. W. Rep., 549.

William M. Clark, contra.

A tenant who has received possession from his landlord has no right to attorn to a third person without first surrendering possession to the landlord or obtaining his consent to such attornment. 12 Am. & Eng. Ency. Law [1st ed.], 699.

If a tenant has once recognized the title of the plaintiff, and treated him as his landlord by accepting a lease from him or the like, he is precluded from showing that the plaintiff had no title at the time the lease was granted. *Townsend v. Davis*, Forrest [Eng.], 120; *Roe v. Prideaux*, 10 East [Eng.], 158; *Doe v. Wilkinsin*, 3 B. & C. [Eng.], 413; *Barwick v. Thompson*, 7 T. R. [Eng.], 488; *Doe v. Pegge*, 1 T. R. [Eng.], 758; *Tompkins v. Snow*, 63 Barb. [N. Y.], 525; *Oakes v. Munroe*, 8 Cush. [Mass.], 282; *Hogan v. Harley*, 8 Allen [Mass.], 525; *Emerick v. Tavener*, 9 Grat. [Va.], 221; *Hawes v. Shaw*, 100 Mass., 287; *Silvey v. Summer*, 61 Mo., 253; *Towne v. Butterfield*, 97 Mass., 105.

A tenant cannot set up against his landlord a title acquired by himself hostile to that which he has acknowledged his landlord possessed. Taylor, Landlord and Tenant [6th ed.], section 705, and notes; *Mattis v. Robinson*, 1 Neb., at page 5. Neither is he permitted to resist the recovery of his landlord, by virtue of an adverse title acquired during his tenancy. *Galloway v. Ogle*, 2 Binn. [Pa.], at page 472; *Graham v. Moore*, 4 S. & R. [Pa.], 466; *Jackson v. Whitford*, 2 Cai. [N. Y.], 215; *Eister v.*

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Paul, 54 Pa. St., 196; *O'Halloran v. Fitzgerald*, 71 Ill., 53; *Bertram v. Cook*, 32 Mich., 518.

A lease from a third person is void as against the landlord. *Lecatt v. Stewart*, 2 Stew. [Ala.], 474; *Jackson v. Hinman*, 10 Johns. [N. Y.], 292. So an adverse claimant, who gets into possession of land by tampering with the tenant, can not resist the landlord's claim where the tenant himself could not. Taylor, Landlord and Tenant [6th ed.], section 705; *Stewart v. Roderick*, 4 Watts & Serg. [Pa.], 188; *Galloway v. Ogle*, 2 Binn. [Pa.], 468; *Caufman v. The Presbyterian Congregation of Cedar Springs*, 6 Binn. [Pa.], 59-62; *Sharpe v. Kelley*, 5 Denio [N. Y.], 431; *Reed v. Shepley*, 6 Vt., 602; *Jackson v. Stewart*, 6 Johns. [N. Y.], 34; *Syme v. Sanders*, 4 Strob. [S. Car.], 196; *Jackson v. Harper*, 5 Wend. [N. Y.], 246; *Chambers v. Pleak*, 6 Dana [Ky.], 426; *Bank of Utica v. Merscreau*, 3 Barb. Ch. [N. Y.], 528; *Tondro v. Cushman*, 5 Wis., 279; *Plumer v. Plumer*, 10 Foster [N. H.], 558; *Jackson v. Wheedon*, 1 E. D. Smith [N. Y.], 141; *Hardisty v. Glenn*, 32 Ill., 62; *Caldwell v. Center*, 30 Cal., 539.

AMES, C.

This is a petition in error to review the judgment of the district court on appeal from a judgment of the county court in an action for forcible detainer. The plaintiff in error was in possession of the premises, as a tenant for the term of one year, of the defendant in error, under a written lease covenanting for the payment of rent in monthly installments and stipulating that in case of default in payment of any such installment for so long as ten days the lessee should be considered as holding over his term. Such a default having been made and continued for more than that length of time, notice was served and this proceeding was begun to recover the possession. As a defense, the tenant pleaded and sought to prove that after he went into possession under the lease the premises were sold to a third person upon an execution for the satisfaction of a judgment at law against one

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J. M. Lyons, the deceased husband of the lessor, after the revivor of the judgment against the representatives of the deceased. The tenant also claims to have "attorned," that is, to have paid or agreed to pay rent to the execution purchaser. The plaintiff in error contends that this plea and offer of proof tendered an issue of title to the premises in controversy and ousted the county court, and consequently the district court, of jurisdiction. Thus is presented the only question in the case.

We think that the objection is not well taken. We do not think it necessary to inquire when or under what circumstances, or if ever, in an action to try title, a tenant may dispute the title of his landlord. The general rule is familiar that a tenant having acquired his possession by reason of the lease, his possession and that of his lessor are identical and that, as between the parties, he is estopped to assert or admit that it is wrongful. On the other hand, if it is assailed it is his duty to defend it or to afford his landlord an opportunity for so doing. But whatever the case may be in actions of ejectment and the like, we think there are no exceptions to the rule that in actions for forcible detainer by lessor against lessee, the latter cannot assert a right of possession under a title paramount and adverse to that of the former. The statute, section 1020 of the Code, gives the remedy to the former without qualification in cases in which the latter is holding over his term. It thus affords the former a remedy by which to compel the latter to do, what by his contract and the general rules of law he is under obligations to do, namely, to yield the possession to the landlord and afford him an opportunity to defend it, unembarrassed by the circumstance of being temporarily out of personal occupancy. Such a rule can do the tenant no injury; while its opposite, by affording opportunities for collusion between tenants and adverse claimants, might open the door to grievous wrongs. We do not discuss the question whether the answer and offer of proof amounted to the assertion of an outstanding paramount title, under which the lessee

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claimed, because we are of opinion that the relation of the parties is such that the plaintiff in error cannot be heard to make such an assertion in this form of action.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

ALEXANDER BUCHANAN, APPELLANT, v. SAUNDERS COUNTY
NATIONAL BANK ET AL., APPELLEES.

FILED APRIL 9, 1903. No. 12,719.

Commissioner's opinion. Department No. 2.

**Banks and Banking: MORTGAGES: PURCHASE OF DECREE BY NATIONAL
BANK: SPECULATION: INJUNCTION. *Smith v. First National Bank
of Chadron*, 45 Neb., 444, followed.**

APPEAL from the district court for Douglas county.
Tried below before KEYSOR, J. *Affirmed*.

Norval Bros., for appellant.

Smyth & Smith, contra.

POUND, C.

The sole question presented by this appeal is whether an owner of mortgaged property may maintain a suit to enjoin sale under a decree of foreclosure on the ground that the defendant, a national bank, had taken an assignment of the decree as a speculation in contravention of the National Banking Act. This question is too well settled to require serious discussion. *Smith v. First National Bank of Chadron*, 45 Neb., 444. The judgment of the district court, sustaining a demurrer to the petition, should be affirmed, and we so recommend.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

Johansen v. Modahl.

PEDER JOHANSEN V. AUGUSTA MODAHL.

FILED APRIL 9, 1903. No. 12,724.

Commissioner's opinion. Department No. 3.

1. Breach of Marriage Promise: DAMAGES: EVIDENCE INSUFFICIENT. Evidence examined, and *held* not sufficient to sustain the promise of marriage alleged in the petition.
2. Breach of Marriage Promise: MEASURE OF DAMAGES: REPUTATION AS TO WEALTH. In an action for breach of promise of marriage, the general reputation of the defendant for wealth, as distinguished from his actual circumstances, is not a proper matter to be taken into account in estimating the amount of damages.

ERROR from the district court for Kearney county.
Tried below before ADAMS, J. *Reversed.*

Dailey & Paulson, for plaintiff in error.

Hague & Anderbry, contra.

ALBERT, C.

This is an action for breach of promise to marry. The answer consists of a general denial and an averment of the fraudulent concealment of fatal infirmities on the part of the plaintiff. There was a verdict for the plaintiff, judgment accordingly. The defendant brings error.

The principal ground of complaint is that the evidence is insufficient to warrant a finding of a contract to marry. If the petition had set up an ordinary engagement to marry, we would be inclined to hold that the evidence is sufficient to sustain a finding in that behalf. But the petition alleges an engagement by correspondence; the correspondence is a part of the evidence in the case. We have examined it, and are satisfied that the engagement was tentative and that neither of the parties was irrevocably committed.

The court instructed the jury that in estimating the damages, they should take into account, among other

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things, the defendant's general reputation for wealth. One fatal objection to this instruction is that there is not a syllable of evidence tending to show the defendant's general reputation for wealth and, even if there was, we do not think that it would be a proper element of damages. The jury were properly instructed to take into account the value of the property owned by the defendant. We think that is as far as the instruction should go. While his reputation for wealth, as distinguished from his actual circumstances, if proved, might possibly give the plaintiff, as his wife, additional social advantages for a while at least, it is too remote to be taken into account in estimating the damages in an action of this character.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

DUFFIE and AMES, CC., concur.

REVERSED AND REMANDED.

COXE BROTHERS & COMPANY V. OMAHA COAL, COKE AND
LIME COMPANY.

FILED APRIL 9, 1903. No. 12,730.

Commissioner's opinion. Department No. 2.

1. **Judgments:** VACATION OF, DURING TERM. A court of general jurisdiction has discretionary power to vacate or modify its own orders and judgments at any time during the term at which they were rendered, upon being satisfied that such action will be in furtherance of justice. *Bradley v. Slater*, 55 Neb., 334.
2. **New Trial:** MOTION OVERRULED: VACATION OF ORDER: DISCRETION: APPEAL AND ERROR. Record examined, and *held*, that it does not appear that the court was guilty of an abuse of discretion in setting aside the order overruling the motion for a new trial.
3. **Appeal and Error:** ASSIGNMENTS AS TO MOTION FOR NEW TRIAL: PLEADING. A judgment will not be reversed for errors which are required to be assigned on a motion for a new trial, unless it is

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alleged in the petition in error and shown by the record that the court erred in overruling such motion.

4. **Appeal and Error: ASSIGNMENTS AS TO MOTION FOR NEW TRIAL: PLEADING: PRACTICE.** Where defendant challenges the court's attention to such defect in the petition in error, in his brief, and orally on the hearing, the above rule will be strictly adhered to.

ERROR from the district court for Douglas county. Tried below before SLABAUGH, J. *Affirmed.*

Bartlett, Dundy & Martin, for plaintiff in error.

Connell & Ives, contra.

BARNES, C.

The plaintiff in error commenced this case in the district court for Douglas county to recover a balance alleged to be due on account for coal sold and delivered to defendant under a written contract entered into by means of a correspondence between it and the defendant. The answer contained a counter-claim for damages for a breach of another contract alleged to have been entered into between the parties by letters and telegrams for the sale and delivery of certain other coal for another purpose, the amount of the counter-claim being nine cents less than the sum alleged to be due the plaintiff. The case was tried in December, 1900, and the plaintiff had a verdict for \$723.09. A motion for a new trial was filed by the defendant, and the hearing thereon was continued until the February term of 1901. On the 12th day of that month the motion was overruled and plaintiff at once caused an execution to issue on the judgment. On the 1st day of March, and at the same term of court, defendant filed a motion to vacate the order overruling its motion for a new trial, and on the 4th day of May, it still being of the February term, the court set aside its former order and granted another hearing on the motion for a new trial. Thereafter the motion was sustained, and a new trial was granted. On the second trial the plaintiff

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amended its petition and claimed a much larger amount than was claimed on the first trial. The defendant filed the same answer, in substance, and on these issues the cause was tried a second time. After the jury had been out some time, and being apparently unable to agree, they were brought into court and instructed to return a verdict in favor of the plaintiff for the sum of nine cents, and they thereupon returned such verdict. The plaintiff excepted, filed its motion for a new trial, which was overruled, judgment was entered on the verdict and the plaintiff prosecutes error to this court.

The petition in error contains sixty-nine assignments, but it is nowhere alleged therein that the court erred in overruling the plaintiff's motion for a new trial. This point was urged by counsel for the defendant in error in his oral argument on the hearing before us, and was also mentioned in his brief, yet counsel for the plaintiff in error gave the matter no attention, made no request to be allowed to amend his petition in error, and the cause was thus submitted. All of the alleged errors now presented by counsel, for our consideration, were contained in the motion for a new trial, and were only such as occurred during the trial of the cause, with the single exception of the ruling sustaining the motion to vacate the order overruling defendant's motion for a new trial. On this point plaintiff contends that the court was guilty of an abuse of discretion, and had no power to vacate his order, although the motion was made at the same term at which the order was entered.

Courts of general jurisdiction, such as the district courts of this state, are endowed by law with ample discretionary power to vacate or modify their own judgments at any time during the term at which they are rendered, upon being satisfied that such action will be in furtherance of justice. *Bradley v. Slater*, 55 Neb., 334; *Smith v. Pinney*, 2 Neb., 139; *Volland v. Wilcox*, 17 Neb., 46; *Harris v. State*, 24 Neb., 803; *Symms v. Noxon*, 29 Neb., 404; *Bigler v. Baker*, 40 Neb., 325.

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The court having power to vacate its order overruling the motion for a new trial, and setting the same down for reargument, it only remains to inquire whether in so doing it was guilty of an abuse of discretion. One of the grounds of the motion for vacating the order was, that the verdict was not sustained by sufficient evidence, and that under the evidence and the law of the case the motion for a new trial should have been sustained. It does not appear, from the ruling, on which of the several grounds contained in the motion the court based its order; and an examination of the bill of exceptions settled on the first trial discloses that it may well have considered that the evidence was insufficient to sustain the verdict, and for that reason it should have sustained the motion for a new trial instead of overruling it. The assignment of error on this point is as follows: "The court erred in granting said order setting aside the said judgment and granting said defendants a new trial; that said order * * * was an abuse of discretion of the court whereby plaintiff was prevented from having a fair trial as will appear from the transcript and evidence contained in volume one of the record."

It does not indicate on which of the numerous reasons assigned in the motion to vacate the order, the court based his ruling, which is now complained of. After a careful examination of the evidence contained in the first bill of exceptions we are unable to say that the court was guilty of an abuse of discretion in setting aside its order, and in granting the defendant a new trial.

As above stated, all of the other errors assigned in the plaintiff's petition relate to matters which occurred upon the second trial of the cause, and are embraced in his motion for a new trial. Having failed to allege in his petition in error that the court erred in overruling his motion for a new trial, none of the assignments contained therein can be considered.

In *James v. Higginbotham*, 60 Neb., 203, the court said: "The decision of the court on the motion for a new trial, is not alleged as error and cannot, therefore, be consid-

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ered. Reviewing courts are authorized to consider only the errors specified in the petition in error. All others are waived. To justify the reversal of a judgment for errors of law occurring at the trial, it must appear, not only that the alleged errors were committed, but also that the court erred in denying the application for a new trial. We believe it has never been held in a law case that a judgment should be reversed for error occurring at the trial, unless there was, in addition to such error, averment and proof of error in the order denying the motion for a new trial. * * * Whether or not there was error in the order overruling the motion for a new trial in this case, we can not decide, because that question is not presented by the record for decision. And without deciding that a new trial should have been granted by the district court, we can not, of course, reverse the judgment and thus, in effect, vacate the verdict. The following cases are referred to in support of our conclusion. *Carson v. Funk*, 27 Kan., 524; *Clark v. Schnur*, 40 Kan., 72; *Struthers v. Fuller*, 45 Kan., 735; *Dryden v. The Chicago, K. & N. R. Co.*, 47 Kan., 445; *Wright v. Darst*, 55 Pac. Rep. [Kan.], 516; *Douglas Co. v. Sparks*, 7 Okla., 259, 54 Pac. Rep., 467; *Beall v. Mutual Life Insurance Co.*, 7 Okla., 285, 54 Pac. Rep., 474; *City of Terre Haute v. Fagan*, 52 N. E. Rep. [Ind.], 457; *Armstrong v. Elliott*, 49 S. W. Rep. [Tex.], 635."

In the case of *Achenbach v. Pollock*, 64 Neb., 436, 90 N. W. Rep., 304, we held that "A judgment will not be reversed for errors which are required to be assigned on a motion for a new trial, unless it is alleged in the petition in error and shown by the record that the court erred in overruling such motion."

In *German Mutual Fire Insurance Co. v. Palmer*, 3 Neb. [Unof.], 688, 92 N. W. Rep., 624, the court said: "The errors assigned are all such as are required to be raised in the district court by a motion for a new trial, and unless the action of that court upon the motion is assigned as error we are not called upon to review them."

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Citing *Gandy v. Cummins*, 64 Neb., 312, 89 N. W. Rep., 777, and *Achenbach v. Pollock*, *supra*.

This question was again before us in the case of *Orcutt v. McNair*, 3 Neb. [Unof.], 608, 92 N. W. Rep., 200, and it was held that "A judgment will not be reversed for errors of law occurring at the trial unless it is alleged in the petition in error that the court erred in overruling the motion for a new trial." It was further held, that "Where the question is raised by counsel the court will adhere to this rule, but where it is not so raised we will consider the objection waived and determine the question upon its merits."

As above stated, counsel for the defendant in error not only urged this objection on the oral hearing, but raised it in his brief, so we can not say that the objection has been waived. We are therefore constrained to follow our former rulings on this question and decline to consider any of the errors assigned in the petition except the one hereinbefore disposed of.

For the above reasons we recommend that the judgment of the district court be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

HENRY P. MARQUARDT V. OMAHA STREET RAILWAY COMPANY.

FILED APRIL 9, 1903. No. 12,745.

Commissioner's opinion. Department No. 2.

Street Railroads: DAMAGES: EVIDENCE INSUFFICIENT. *U. P. Steam Baking Co. v. Omaha Street Railway Co.*, ante, page 396, 94 N. W. Rep., 533, followed and approved.

ERROR from the district court for Douglas county. Tried below before SLABAUGH, J. *Affirmed*.

Weaver & Giller, for plaintiff in error.

John L. Webster, contra.

Cozad Irrigation Co. v. Barnes.

BARNES, C.

This was an action originally brought in the county court of Douglas county by Henry P. Marquardt against the Omaha Street Railway Company, to recover damages for personal injuries alleged to have been sustained by him by reason of the collision between one of the defendant's street cars and a bakery wagon belonging to the U. P. Steam Baking Company, which was the basis of the action in the case of the *U. P. Steam Baking Co. v. Omaha Street R. Co.*, ante, page 396, 94 N. W. Rep., 533, just decided by this court.

The trial in the county court resulted in a verdict for the defendant; plaintiff appealed to the district court and the cause was again tried, and a verdict was returned for the defendant, and from a judgment thereon, plaintiff prosecuted error to this court.

The facts in this case are just the same as in *U. P. Steam Baking Co. v. Omaha Street R. Co.*, supra,—the same accident being the basis of both suits,—and we find practically the same evidence contained in the bills of exceptions in both cases. We hold, therefore, that the plaintiff herein was not entitled to recover, and the evidence will not sustain a verdict for him on any theory.

We therefore recommend that the judgment of the district court be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

COZAD IRRIGATION COMPANY V. LUTHER BARNES.

FILED APRIL 9, 1903. No. 12,748.

Commissioner's opinion. Department No. 1.

- 1. Evidence: SUFFICIENT: APPEAL AND ERROR.** A verdict and judgment thereon will not be disturbed in this court, if sustained by sufficient competent evidence.

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2. **Account, Action on: EVIDENCE SUFFICIENT.** Evidence examined, and *held* sufficient to support the verdict and judgment.

ERROR from the district court for Dawson county. Tried below before SULLIVAN, J. *Affirmed.*

Edward A. Cook, for plaintiff in error.

John H. Linderman, *contra.*

KIRKPATRICK, C.

This is a proceeding in error brought to reverse a judgment of the district court for Dawson county in the trial of a cause in that court on appeal from justice court. The petition of defendant in error sets out his employment by plaintiff in error to lath and plaster a certain house being erected by plaintiff in error in Dawson county at an agreed price per square, amounting to the sum of \$38.40, in which amount with interest he prayed judgment. Plaintiff in error answered, admitting the employment as alleged, and pleaded that defendant in error represented himself as being a competent and skillful plasterer, and that he agreed to complete the work in a first-class manner, plaintiff in error to furnish the material; that the work was performed in such a careless and negligent manner that it was worthless, and that as a consequence a large portion of the plaster had fallen off; that plaintiff in error had caused a coat of hard finish to be put on the plastered walls, with the hope of improving the job, at a cost of \$34; that this did not improve the work, and that all the plastering would have to be removed from the building, to the damage of plaintiff in error in expenses and injury to the building in the sum of \$100, praying judgment against defendant in error in the sum of \$134. To this answer a reply was filed, admitting that defendant in error had represented himself as a skillful and experienced lather and plasterer, and that plaintiff in error was to furnish the material for the work,

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and that defendant in error was to and did put two coats of plaster on the inside walls of the building, and denying generally all the other allegations of the answer. A jury being waived, trial was had to the court, resulting in the following finding by the trial court:

"The court finds that plaintiff claimed only to have ordinary skill and judgment as a plasterer at the time of the contract with the defendant; that at that time he had such skill and judgment as a plasterer in the mechanical work upon the building, and that he exercised the best judgment he had in the mixing of the mortar; that in all respects he did as good work as he knew how to do, and was in no respect careless so far as the plastering was concerned; that the defect in the plastering was the result of the material not being good, and the court, therefore, finds for the plaintiff and against the defendant as to the plastering."

To this finding, exception was taken and it is quite probable that the first portion thereof is somewhat illogical. But the court does expressly find that the defect in the plastering was the result of the material not being good. The only question presented by the record is whether the finding and judgment are supported by the evidence.

By the testimony of defendant in error and a number of other witnesses, it is made to appear that defendant in error was an experienced plasterer, and that the work was skillfully done; that the sand furnished by plaintiff in error was largely quicksand taken from the banks of the Platte river, and that it was not suitable for the purpose for which it was used, and would not make good walls; that defendant in error called the attention of officers of plaintiff in error to the quality of the sand, and that he did not like to use it, saying that it was not good sand and did not do good work. On the other hand, the president of plaintiff in error and a number of witnesses gave testimony, from which it is made to appear that defendant in error examined the sand when it was

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hauled to the house, and pronounced it satisfactory, and that the reason why the job was not satisfactory was that defendant in error did not understand how to make mortar when that quality of sand was used, which required a greater per cent. of lime; that when such larger per cent. of lime was used, a good job could be done. Witnesses of defendant in error, who were plasterers, testified in rebuttal that when that kind of sand was used, a less per cent. of lime was necessary in order to do satisfactory work.

This being the state of the evidence, revealing a sharp conflict throughout, we can not say that the finding of the trial court for defendant in error is unsupported, and under the rule settled in this state by many decisions, we will not disturb the finding. *Burwell Irrigation Co. v. Lashmett*, 59 Neb., 605; *Halmes v. Dorey*, 53 Neb., 254.

It is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and LOBINGIER, CC., concur.

AFFIRMED.

EUNICE P. WHELDON, APPELLEE, v. NATHANIEL CORNETT,
JR., ET AL., APPELLANTS.

FILED APRIL 9, 1903. No. 12,761.

Commissioner's opinion. Department No. 1.

1. **Mortgages: FORECLOSURE: APPRAISAL: GRANTEE OF DEED AS FREEHOLDER.** Where the return to an order of sale under foreclosure recites that the appraisers were freeholders, the order of confirmation will not be reversed on appeal because one of the appraisers is shown not to have received a deed for his land, he having purchased the same and, apparently, residing thereon.
2. **Mortgages: FORECLOSURE: APPRAISAL: COPY DEPOSITED "FORTHWITH."** A copy of the appraisal is deposited "forthwith" in the meaning of the statute if filed the day following the appraisement.
3. **Mortgages: FORECLOSURE: ORDER OF SALE: SEAL.** The failure of the clerk to attach his seal to the order of sale until after the sale has taken place is not fatal.

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APPEAL from the district court for Howard county. Tried below before THOMPSON, J. *Affirmed.*

Henry Nunn, for appellants.

C. C. Marlay and Flower, Peters & Bowersock, contra.

LOBINGIER, C.

This is an appeal from an order confirming a sale under foreclosure. The first complaint is that one of the appraisers was not a freeholder as required by section 491a of the Code. The testimony shows that this appraiser had purchased certain lands in Howard county under a contract on which he made a partial payment; that he had paid taxes on the land and, apparently, was residing thereon but had not yet obtained his deed. The term freeholder, as used in statutes, of the class now before us, is not construed with the same technical strictness as when employed in deeds or other instruments affecting title. The purpose and policy of such a statute are, evidently, to prevent appraisements being made by those who are not themselves interested in lands; and this would seem to be accomplished if the appraiser has a substantial interest in realty, even though it fall short of being a technical "freeholder."

In *Commonwealth v. Burcher*, 2 Rob. [Va.], 826, where the facts were similar to this case except that a deed had been executed and placed in escrow to be delivered to the vendee when he should have completed his payments, it was held that the latter "possessed a sufficient freehold qualification to constitute him a good grand juror. It was clearly not necessary to his competency that the legal title to the house and lot should have been in him. *Cestuis que use* of freehold estates are good jurors in England. Coke upon Littleton, 272b."

We do not think that the placing of the deed in escrow makes that case necessarily stronger than this. The tes-

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timony of this appraiser was such as to imply at least, that he might receive his deed before the payments were completed. In this case, moreover, the return recites that the appraiser was a freeholder.

In *Exendine v. Morris*, 8 Mo., App., 383, where nothing of the kind appeared, it was said: "Unless the fact that the appraiser's neglect to certify in their appraisement certificate that they are freeholders is to be held absolutely fatal to such a sale, we do not see how to escape the conclusion that the fact that the appraiser was in possession of land, claiming to own it, must be taken to establish sufficiently his qualification as appraiser."

In *Cummings v. Hyatt*, 54 Neb., 35, this court left open the question whether a husband living with his wife on her land was a freeholder within the meaning of a statute providing for the calling of an election to vote bonds. But in *Hughes v. Milligan*, 42 Kan., at page 400, it was held that such a husband was a freeholder within the terms of a statute relative to the opening of highways. In *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb., 281, the identical section now in question was construed and an appraiser was held to be a freeholder though his deed had originally been executed and delivered to him as a mortgage.

It is true that in *The People v. Hynds*, 30 N. Y., 470, the opinion of the lower court contains the statement that a vendee in a land contract is not a freeholder and that the term "means such as have the legal title to real estate," which is opposed to *Commonwealth v. Burcher*, 2 Rob. [Va.], 826, *supra*, the latter not being referred to. The court of appeals, however, affirmed the judgment, not on this point, but on the ground that the proceedings, which were for the opening of a highway, were void for another reason.

But if it were still doubtful whether the return of the order of sale is correct in reciting that the appraiser was a freeholder, we do not think that the order of confirmation should be reversed.

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In *Hill v. Baker*, 32 Ia., 302, where a statute in other respects like ours required the appraiser to be a householder, and one of them was not, the court declined to set aside the sale, and said: "The defect complained of is a mere irregularity, not affecting the power of the sheriff to sell, and hence not rendering the sale void."

The entire omission of the appraisement is not jurisdictional but a mere irregularity. *Neligh v. Keene*, 16 Neb., 407. In this case there was no motion for a new trial and no petition in error nor any showing or claim of prejudice by reason of the appraisal. We do not think that the sale should be set aside on appeal on account of a possible doubt as to the legal character of the appraiser's interest in the land on which he lived.

Another objection is that while the appraisement was made on July 11, the copy was not filed until the next day. But there is nothing to show that this was not "reasonable dispatch." *Hubbard v. Hennessey*, 2 Neb. [Unof.], 816, 90 N. W. Rep., 220, where four days were allowed.

The final complaint is that the clerk failed to attach his seal to the order of sale until after the sale had actually taken place. But not only was this defect curable by amendment (*Winchell v. McKinzie*, 35 Neb., 813, *Taylor v. Courtney*, 15 Neb., 190; *Young v. Wood*, 63 Neb., 291, 88 N. W. Rep., 528), but the order of sale being itself unnecessary the defect would not in any event be fatal. *Passumpsic Savings Bank v. Maulick*, 60 Neb., 469. An affirmance of the order is recommended.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

Power v. Allen.

FARINGTON POWER, APPELLANT, V. JAMES G. ALLEN ET
AL., APPELLEES.

FILED APRIL 9, 1903. No. 12,766.

Commissioner's opinion. Department No. 1.

Deeds: EXECUTION OF: EVIDENCE CONFLICTING. The sole question in this case is the execution and delivery of a deed, which plaintiff says was given him by a third party, as the deed of defendant, and which was lost without recording, and which defendant says he never made nor delivered nor received a consideration for. The decree rendered for defendant on this conflicting evidence will not be disturbed.

APPEAL from the district court for Douglas county.
Tried below before DICKINSON, J. *Affirmed.*

Farington Power, for appellant.

Switzler & St. Clair, contra.

HASTINGS, C.

This is a suit to quiet title to the north ten feet of lot 20 and the south twenty feet of lot 21, in block 2 in Alamo Plaza addition to the city of Omaha. Plaintiff's action was dismissed by the trial court and he appeals.

He claims to have received, in 1896, a deed from the defendant Allen, for the property in question; he claims to have lost it sometime in the year 1898; he claims to have lost track of defendant or never to have known his address until sometime in February, 1901, when it was learned from the city directory that he was employed in a bank in South Omaha. Plaintiff says that he immediately demanded his deed and was put off by the defendant, the latter saying that he would look the matter up; that in March, 1901, he saw the defendant again and the latter then told him that Byron Reed Company would have to be consulted as to whether or not a new deed could be made. About the middle of May plaintiff took possession of the property with his family and he began this action to quiet title. The defendant Allen answered

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with a general denial, which at the trial was amended to admit title in himself.

Mr. Power testifies that he traded 160 acres of land in Antelope county, the description of which he can not remember, for the deed to this property; that he had the deed in his possession, showed it to his wife and to a Mr. Buchanan and he thinks he delivered the deed to the latter in 1898 and has never been able to find it since. He says that when he asked for another deed to this property defendant asked if he had assumed the mortgage. Defendant also asked plaintiff if he was going to build on the premises, and promised to pay all expenses connected with the giving of a new deed. Mrs. Power, plaintiff's wife, testifies to having seen the deed; that the last time she saw it was in the fall of 1898, when plaintiff took it to Buchanan for the purpose of making a trade. Mr. Buchanan says he saw the deed; that the property was conveyed subject to a mortgage of \$2,000; that at one time he called upon the defendant Allen, and asked him to make a new deed to the property and Mr. Allen said he would have to consult Byron Reed Company.

At the trial Mr. Allen positively denied having made any deed or having traded off this property or having ever received property in lieu of it and denied all acquaintance with Mr. Power or any knowledge of any such transaction until Power came to him in the spring of 1901. The trial court having found for the defendant on this evidence, we do not see how such finding can be disturbed, for there is plainly evidence to support it, and Mr. Power himself has made no showing that the deed, which he claims to have held for over two years without recording and subsequently to have lost, was executed by Mr. Allen or acknowledged by him; he is unable to state even the name of the notary.

It is recommended that the judgment of the district court be affirmed.

KIRKPATRICK and LOBINGIER, CC., concur.

AFFIRMED.

City of South Omaha v. Fennell.

THE CITY OF SOUTH OMAHA V. GRACE FENNEL.

FILED APRIL 9, 1903. No. 12,767.

Commissioner's opinion. Department No. 2.

1. **Negligence: CONTRIBUTORY: EVIDENCE: INSTRUCTIONS: PREJUDICE.** Erroneous instructions upon the subject of contributory negligence are without prejudice if the plaintiff's evidence does not disclose contributory negligence and no evidence sufficient to establish it was adduced by the defendant.
2. **Trial: EVIDENCE: VERDICT CORRECT: ERROR IN RULINGS: PREJUDICE.** Where, under all the evidence, the plaintiff must recover, errors in rulings upon requests for instruction are without prejudice.
3. **Trial: INSTRUCTIONS: MEMORANDUM OF AUTHORITIES APPENDED.** A memorandum of authorities in support of a request for an instruction, written upon the margin thereof, does not, of itself, afford ground for refusing to give the instruction; if otherwise proper, it should be given with the memorandum erased or omitted.
4. **Trial: WITNESSES: QUESTIONED BY JUDGE: PREJUDICE.** In furtherance of justice or to enable himself to make proper rulings upon evidence and frame proper instructions, the trial judge may, in his discretion, put questions to witnesses. Such action will be reviewed only for abuse of discretion.
5. **Trial: DAMAGES: EXCESSIVE: PERSONAL INJURIES.** An award of \$3,000 damages for a broken leg which was skillfully set and "formed a good union" in the ordinary course, and is not shown to have resulted in any permanent injury beyond what is usually involved in such an accident, *held* excessive.

ERROR from the district court for Douglas county.
Tried below before BAKER, J. *Affirmed upon remittitur.*

A. H. Murdock, for plaintiff in error.

Thomas & Nolan, contra.

POUND, C.

Plaintiff in error complains of instructions given by the trial court, of rulings upon requests for instruction, of the action of the trial court in putting certain questions to witnesses, and of the amount of damages awarded.

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Most of these assignments of error may be disposed of somewhat summarily for the reason that we are satisfied plaintiff was entitled to recover under all the evidence and hence that the errors assigned were without prejudice.

The instructions upon the subject of contributory negligence put the burden of proof upon the defendant without adverting to the effect of contributory negligence when disclosed by plaintiff's evidence. It may be also that they are open to some objection on the score of inconsistency with one another. But plaintiff's evidence does not show any contributory negligence upon her part and no sufficient evidence to establish it was adduced by the defendant. Hence we need not pass upon these instructions as abstract propositions. *Pennsylvania Co. v. Kennard Glass & Paint Co.*, 59 Neb., 435. The same considerations apply to the rulings upon requests for instruction. Since, under all the evidence, the plaintiff must recover, errors, if any, in rulings upon requests for instructions going to the merits are no ground of reversal. *Jeffres v. Cashman*, 42 Neb., 594.

It is contended by defendant in error also that one of the instructions requested was properly refused because a memorandum of authorities in support of the request was written upon the margin. We do not think this fact, of itself, affords ground for refusing to give the instruction. If otherwise proper, it should have been given with the memorandum erased or omitted. *Herzog v. Campbell*, 47 Neb., 370; *The Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578. But, as we have seen, the error was without prejudice.

With respect to the action of the trial court in putting questions to some of the witnesses, we think the rule to be deduced from prior decisions is that the trial judge may take this course, in his discretion, in furtherance of justice or to enable himself to make proper rulings upon evidence and frame proper instructions, and that his action will be reviewed only for abuse of discretion. *Omaha*

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Brewing Association v. Bullnheimer, 58 Neb., 387, 391; *Bartley v. State*, 55 Neb., 294. The trial judge is in a better position than the reviewing court to know when the circumstances warrant or require interrogation of witnesses from the bench. The power undoubtedly should be exercised sparingly and in such a manner as to preclude prejudice to either party, but we see nothing in the case at bar to indicate prejudice nor to make it appear that the questions asked had any other effect than to expedite the trial and cut short contentions between counsel over the admission of evidence.

We are of opinion, however, that the damages awarded are excessive. The action was brought to recover for injuries sustained by reason of a defective sidewalk. The principal injury was a transverse fracture of both bones of the leg a few inches above the ankle. The limb was skilfully set and formed what the surgeons examined unanimously termed "a good union" in the ordinary course, and it is not shown that any permanent injury has resulted beyond what is usually involved in such an accident. The plaintiff is shown to have suffered great pain and her injury, under all the circumstances, undoubtedly was such as to entitle her to a liberal award at the hands of the jury. But we can find no justification in the evidence for the large sum at which her damages were assessed. In our opinion \$2,000 will be ample compensation, and is as large a verdict as the evidence will warrant.

It is therefore recommended that in case within forty days from the filing of this opinion the defendant in error remits all damages in excess of \$2,000 and interest, the judgment of the district court be affirmed; otherwise that it be reversed and the cause remanded for a new trial.

BARNES and OLDHAM, CC., concur.

If the defendant in error within forty days from this date remits all damages awarded her in excess of the sum of \$2,000 and interest, the judgment of the district court

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is affirmed; otherwise it is reversed and the cause remanded for a new trial.

AFFIRMED UPON REMITTITUR.

JAMES A. STONE, APPELLANT, V. MARY C. SNELL ET AL.,
APPELLEES.

FILED APRIL 9, 1903. No. 12,770.

Commissioner's opinion. Department No. 3.

Injunction: Possession: RIGHT DOUBTFUL: REMEDY AT LAW. Where both the possession and right of possession are involved in doubt the doubt should be resolved by a legal investigation and not by an action in equity to restrain one of the parties from entering upon the premises.

APPEAL from the district court for Greeley county.
Tried below before PAUL, J. *Affirmed.*

Anderson & Maggi and James R. Hanna, for appellant.

John E. Kavanaugh, J. R. Swain and J. B. Barry, contra.

DUFFIE, C.

Samuel E. Godkin, being the owner of the northwest quarter of section 4, township 18, range 9 west of the 6th P. M., in Greeley county, Nebraska, entered into a written contract with James A. Stone, the appellant, for the sale of said land for the sum of \$2,500, \$100 of which were paid at the date of the contract, to wit: December 11, 1901, the balance to be paid when an abstract showing perfect title in Godkin was furnished. Godkin and wife executed a deed at the same time, and both contract and deed were left in the hands of O. E. Green, a banker residing at Genoa, Nebraska, to be delivered upon the payment by Stone of the balance of the purchase money.

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About this time Godkin removed from the state of Nebraska to Idaho, leaving the farm in charge of one David Lanigan, with oral instructions to rent the same for the ensuing year provided Stone had not completed his contract of sale by March 1, 1902. Some objection was made to the abstract furnished by Godkin, the release of a certain mortgage not being regular or satisfactory to Stone and his agent S. V. Parrott, who conducted the business for him. Godkin being absent from the state, Parrott undertook himself to obtain a proper release of the mortgage referred to and apparently succeeded in so doing on or about the 4th day of March, 1902, on which date the balance of the purchase price was paid to Green, who delivered the deed. In the meantime Lanigan had received a letter from Godkin dated Cambridge, Idaho, January 27, 1902, that part of which material to the question involved is as follows:

"I hear that those parties that bought my place have done nothing since they put up the \$100. Now I don't want you to turn over the place or let anyone they send there have possession until further notice from me or O. E. Green of Genoa, and if you hear nothing further have the place rented for the 1st of March."

February 19, 1902, Lanigan wrote to Green as follows:

"S. E. Godkin left his farm in my charge and wrote me on January 27th saying he had got nothing since he sold the place and got \$100 and if I heard nothing further to have the place rented for the 1st of March and not give possession unless I heard from you or him. Now I would like to know if you closed the deal or would I rent it as I have a good chance now to rent. Please answer by return mail to Cedar Rapids as I will call there for it."

The next day Green replied to this letter as follows:

"Yours of the 19th to hand in regard to the S. E. Godkin land. Replying would say that I do not think you better rent it as I received a letter to-day from Mr. Parrott stating that as soon as he received a certain release, which was improperly executed, he would be ready to

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pay the money and he was looking for the return of the release on every mail. I think there is no doubt that the matter will be cleaned up very shortly."

Lanigan waited until March 1st and hearing nothing further from Green, rented the land to Mrs. Snell for the year 1902. Mrs. Snell apparently took possession and moved some of her effects into the house on the premises. Shortly after the delivery of the deed S. V. Parrott and Lee Parrott, his nephew, demanded the keys of the farm house from Lanigan. He replied that he had delivered the keys to Mrs. Snell to whom he had rented the farm on the first day of March. The Parrotts then went to the farm, forced open the door of the house and set the furniture they found therein out in the yard. They claimed to have left one John Curry in possession but there is no evidence that Curry was on the premises or that he took possession or was in possession of the farm at any time, and this is made more apparent from the fact that some days thereafter when Parrott and a renter, to whom he had leased the farm for the ensuing year, returned to the premises they found the doors of the house closed and barricaded. They went upon the premises, however, and commenced work preparatory to seeding the farm, when, it is alleged, Mrs. Snell and her son came upon the farm claiming possession thereof under her lease and ordering them away. It is also claimed that she made threats and demonstrations with a club which she had in her hand. She finally left and went to the residence of Lanigan but returned the next day and made such threats as caused Parrott's renter and a man in his employ to leave the farm, whereupon this action was commenced and a temporary injunction issued restraining the appellees from entering upon said premises and from cultivating the same or from interfering with the plaintiff, his agents, tenants and employees in the sowing of crops and cultivating the same on the premises until the further order of the court. A trial of the case was had on April 16, 1902, and a finding was made by the court that the action

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was one to determine the right of possession of the real estate described in the petition, and that the plaintiff was not entitled to an injunction and dismissing the plaintiff's petition with costs.

We incline to the opinion that the court was right in dismissing the plaintiff's petition. Godkin, when he moved from his farm, left it in charge of Lanigan with instructions to rent it if it was not sold by March 1st. At a later date he wrote him from Idaho saying that no sale had been concluded and to let no one have possession until further directed by himself or by Mr. Green. The evidence is undisputed that no sale of the farm was concluded until March 4, 1902. In the meantime, and on March 1st, Lanigan, carrying out Mr. Godkin's instructions, rented the farm to Mrs. Snell who took possession and moved some of her effects into the dwelling-house on the premises. She was placed in peaceable possession. The keys of the house had been delivered to her. Her possession was actual and perfect. Notwithstanding this, Parrott, at some later day in March, the exact date not appearing in the record, broke into the house and removed Mrs. Snell's furniture into the yard. It is true that he claims to have sent her word that she should take away her things and remain off of the premises, and that she did remove her effects, thus abandoning her possession. There is no evidence whatever that she took possession of the effects removed from the house to the yard by Parrott. There is evidence that when Parrott returned to the farm at a later date these effects had been removed but who took them away is not attempted to be shown. It is evident too that Mrs. Snell had returned to the house and barricaded the doors, that being the condition in which Parrott found them on his second visit. Here was a fight over the possession. That Mrs. Snell had the first possession obtained peaceably and in a lawful manner is not disputed. That the possession of Stone through his agent Parrott was accomplished by force and by breaking in the doors of the house appears from his own testimony.

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In this condition of the case we do not think that equity will take jurisdiction to determine the right of possession between the parties. The law affords ample remedy and is the proper tribunal to determine that question. Most certainly a court of equity will not take possession from one and give it to another where the legal right of possession is in dispute and undetermined. The rule that equity will interpose to prevent a continuing trespass or to enjoin parties who are disturbing the peaceful possession and quiet enjoyment of the owner of land has no application to the facts in this case. The plaintiff has no standing to ask a court of equity to protect him in a possession which he acquired by force and by entering upon the prior possession of another.

We recommend the affirmance of the decree.

ALBERT and AMES, CC., concur.

AFFIRMED.

HENRY A. COX V. WILLIAM H. CROW.

FILED APRIL 9, 1903. No. 12,771.

Commissioner's opinion. Department No. 1.

1. **Exceptions, Bill of:** EVIDENCE IN SUPPORT OF MOTION: APPEAL AND ERROR. The evidence upon which the trial court acted in overruling a motion, not being preserved in a bill of exceptions, and such evidence being necessary to a determination of the particular error complained of, the ruling of the trial court will not be disturbed.
2. **Appeal and Error: ASSIGNMENTS: SPECIFIC.** Alleged errors in the giving of instructions must be specifically pointed out, or they cannot be considered by the supreme court.
3. **Replevin: EVIDENCE SUFFICIENT.** Evidence examined, and held sufficient to sustain verdict and judgment.

ERROR from the district court for Phelps county. Tried below before ADAMS, J. *Affirmed.*

E. C. Dailey, for plaintiff in error.

R. L. Keester, contra.

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KIRKPATRICK, C.

This is a proceeding brought to reverse a judgment of the district court for Phelps county in an action of replevin. The trial resulted in a verdict and judgment for defendant in error, defendant below. The first assignment is that the trial court erred in overruling a motion to dismiss the appeal prosecuted from the justice court for want of jurisdiction for failure of defendant to give an appeal bond within ten days after the rendition of the judgment in justice court as by law provided. It is contended in briefs that judgment was rendered in justice court on October 27, 1898, and that on the 5th day of November, 1898, and within ten days, defendant presented a bond for appeal which was signed by sureties residing outside of Phelps county, and that for that reason the justice of the peace rejected the bond, and thereupon the defendant offered to deposit the sum of \$50 with the justice in lieu of the usual bond. This offer was accepted by the justice, and the money was deposited. On November 8, the justice concluded that his acceptance of the deposit was unauthorized, so notifying defendant. The latter then immediately procured and delivered an appeal bond in all respects regular. Though this bond was in fact delivered on November 8, it was dated as of November 5 by the justice, who approved it as of that date. The motion to dismiss the appeal was tried in the district court upon an agreed statement of facts, and an affidavit made by the signers of the bond to the effect, as alleged, that the bond was in fact signed on November 8. The trial court overruled the motion to dismiss the appeal, and retained the case for trial.

Neither the affidavits filed in support of the motion, nor the agreed statement of facts presented to the trial court, upon which the motion to dismiss was determined, are preserved in a bill of exceptions. Purported copies of these papers are attached to and filed with the transcript in this case. This is clearly insufficient to entitle

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them to consideration. In *Perry v. State*, 37 Neb., 623, this court, in discussing this identical question, said: "In order for this court to examine the evidence embraced in a stipulation of facts between the parties in a case tried in the district court, such stipulation must be incorporated in the bill of exceptions." And in *Cobbey v. Wright*, 23 Neb., 250, the same rule was announced in substantially the same language. Many other cases could be cited, but it is unnecessary. Had the transcript of the justice of the peace been brought to this court, it is possible that the record would present for consideration the ruling of the trial court in refusing to dismiss the appeal, but no such record being here it must be presumed that the trial court's action was right.

Complaint is made of the rulings of the trial court in giving instructions Nos. 1, 4, 7, 8, 9, 10, 11, and 12. No specific error is pointed out in any of these instructions, but it is stated generally that they are inapplicable to the evidence and incorrectly state the law. Our examination of the evidence has convinced us that the instructions correctly set forth the issues, and state the law applicable thereto.

No error having been made to appear in the proceedings had, it is recommended that the judgment of the district court be affirmed.

HASTINGS and LOBINGIER, CC., concur.

AFFIRMED.

MARY GENAU ET AL., APPELLANTS, V. LENA K. RODERICK
ET AL., APPELLEES.

FILED APRIL 9, 1903. No. 12,906.

Commissioner's opinion. Department No. 2.

1. Courts: JURISDICTION OF DISTRICT: PROBATE: CONTRACT TO ADMINISTER ESTATE: SPECIFIC PERFORMANCE. The district court has no original jurisdiction of a suit in equity for specific performance of a contract entered into by the heirs at law and next of kin

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of a testator, for the purpose of settling a will contest, to set aside probate of the will, divide the estate among the contracting parties in certain proportions, and administer such estate out of court.

2. **COURTS: JURISDICTION OF PROBATE: EXCLUSIVE: CONTRACT TO ADMINISTER ESTATE: SPECIFIC PERFORMANCE.** Suit for such purpose must be brought in the county court, which has full and complete equity powers as to all matters within its exclusive jurisdiction.

APPEAL from the district court for Saline county.
Tried below before STUBBS, J. *Affirmed.*

George H. Hastings and Wilson & Brown, for appellants.

Abbott & Abbott, contra.

POUND, C.

This suit involves the same controversy as *Genau v. Abbott*, — Neb., —, 93 N. W. Rep., 942. After the county court had struck the petition to set aside the probate of the will from its files, the widow and all the heirs at law and next of kin except the beneficiary in the will joined in a suit in equity in the district court to obtain relief against the order admitting the will to probate and specific performance of the contract of settlement. It is alleged that before expiration of the statutory period for appealing from the order admitting the will to probate the plaintiffs entered into a written contract with the beneficiary of the will, the only other person interested, whereby the probate of the will was to be vacated, the dispositions made therein set aside, the property divided among the contracting parties in certain proportions, and the estate administered out of court by a trustee designated in the contract. It is alleged further that after the time allowed for an appeal had expired, the defendant repudiated the contract and refused to carry it out. The district court sustained a demurrer to the petition, and its ruling thereon is assigned as error.

We think the judgment is right. The constitution gives

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the county court "original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians, and settlement of their accounts." Article 6, section 16. The statutes provide that its original jurisdiction in these matters shall be exclusive. Section 3, chapter 20, Compiled Statutes [Annotated Statutes, section 4787]. As to such matters, the county court is a court of general jurisdiction. *Lydick v. Chaney*, 64 Neb., 288, 89 N. W. Rep., 801. It has full and complete equity powers as to all subjects within its exclusive jurisdiction. *Williams v. Miles*, 63 Neb., 859, 89 N. W. Rep., 451. Clearly the district court had no original jurisdiction of the suit so far as it seeks to set aside the order admitting the will to probate. *Williams v. Miles*, *supra*. For the same reasons it could not entertain, in the first instance, a suit for specific performance of a contract to administer an estate out of court and divide it in certain proportions among the contracting parties. To carry out this contract, the court would have to settle the estate as a court of probate or by proceedings analogous to suits in equity for administration under the old practice. The trustee would make reports and accounts, creditors would present and litigate claims, and orders as to sale and disposition of personal property would be made as in an ordinary probate proceeding. The whole suit would come within the purview of the statutory and constitutional provisions as to jurisdiction of the county court. Such cases as *Becker v. Anderson*, 6 Neb., 499, and *McGlave v. Fitzgerald*, — Neb., —, 93 N. W. Rep., 692, are quite different. Those were not administration proceedings in any sense. They did not involve settlement of the estate concerned. They were merely ancillary proceedings to assist the administration in the county court by reaching assets or trust funds which, when gathered in, were to be disposed of, administered and distributed in the county court. Here the very purpose of the suit is to have the estate administered in accordance with the contract instead of under the will.

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Suit for that purpose may be maintained in the first instance in the county court only.

We therefore recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

CHARLES J. BARBER V. EDWARD KRUG.

FILED APRIL 22, 1903. No. 12,302.

Commissioner's opinion. Department No. 2.

Principal and Agent: FRAUD OF AGENT: CONTRACTS: CORPORATIONS: EVIDENCE. *Barber v. Martin*, 67 Neb., 445, 93 N. W. Rep., 722, followed and approved.

ERROR from the district court for Douglas county. Tried below before BAXTER, J. *Affirmed*.

V. O. Strickler and W. W. Morsman, for plaintiff in error.

Byron G. Burbank, contra.

OLDHAM, C.

Every question involved in this controversy has been passed upon by this court in the case of *Barber v. Martin*, 67 Neb., 445, 93 N. W. Rep., 722. On the question of liability the cases stand on all fours. Every objection urged against the proceedings of the trial court in the instant case have been determined against the contention of plaintiff in error in *Barber v. Martin, supra*.

Being entirely satisfied with the conclusions reached in that case, we recommend that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

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THE W. J. PERRY LIVE STOCK COMMISSION COMPANY, APPELLEE, v. NELLE S. BIGGS, EXECUTRIX OF THE ESTATE OF EDWARD C. BIGGS, DECEASED, APPELLEE, IM-
PLEADED WITH NELLE S. BIGGS ET AL., APPELLANTS.

FILED APRIL 22, 1903. No. 12,355.

Commissioner's opinion. Department No. 1.

1. Homestead: TITLE: HUSBAND AND WIFE: ESTATES: EXEMPTION. Where title to the homestead is in the husband at the time of his death, its value above the homestead exemption is liable for the satisfaction of claims duly allowed against the estate.
2. Homestead: TITLE: EXEMPTION: EVIDENCE SUFFICIENT. Evidence examined, and *held* sufficient to sustain the findings and judgment of the trial court.

APPEAL from the district court for Seward county.
Tried below before SORNBORGER, J. *Affirmed.*

C. E. Holland, for appellants.

M. D. Carey and *D. C. McKillip*, *contra.*

KIRKPATRICK, C.

This controversy arises upon the following state of facts: On January 4, 1896, Edward C. Biggs and his wife resided in the town of Seward, and the husband owned lots 1, 4, and 5, in block 1, of the town of Seward. On the date mentioned Biggs and his wife made a conveyance of the premises to Winefred Startsman, a sister of Mrs. Biggs, for the expressed consideration of \$3,600, but for an actual consideration of \$1. Immediately thereafter Startsman made a conveyance of the same premises either to E. C. Biggs or his wife, Nelle S. Biggs. The property was at that time subject to a mortgage of \$1,000 and some accrued interest. The last mentioned deed was never placed of record, and at the trial of this cause was by appellant claimed to have been lost. On May 17, 1899, Startsman made a second deed covering the same property,

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which purported to be a duplicate of the deed alleged to be lost, the grantee therein named being Nelle S. Biggs. In the meantime Biggs had contracted considerable indebtedness. He was a practicing attorney, and it seems that as such he collected during his practice various items of money due to his clients and converted the same to his own use. He had put improvements upon the property amounting to several hundred dollars. The indebtedness he had contracted amounted at the date of his death, March 8, 1899, to \$1,837.39, and claims in this amount were duly allowed by the county court of Seward county against his estate. Mrs. Biggs, who had been appointed administratrix, filed an inventory showing the total assets of the estate as amounting to \$485.10. The real estate above mentioned, upon which he and his wife had been living, was not included in this inventory. Appellees, for themselves and all other creditors of the estate, filed a petition in the district court, seeking to have the deed from the Biggses to Startzman, and from Startzman to Nelle S. Biggs declared fraudulent and void as to creditors, and have the property adjudged to be the property of Edward C. Biggs, that the value thereof above \$2,000, the homestead exemption of Mrs. Biggs, be subjected to the payment of the debts of the estate. After this action was instituted, Mrs. Biggs transferred the property to appellant Thomas H. Wake, for the sum of \$2,800, and on September 25, 1900, Wake deeded the property to Emma T. Jones whom he afterwards married. Wake paid to his grantor Nelle S. Biggs on the purchase price of the property the sum of \$2,200, but upon learning of this litigation, retained of the purchase price for his own protection the sum of \$600. An amended petition was thereupon filed by appellee asking to have these additional conveyances vacated and set aside, and in the event the conveyances were held valid, that Wake be required to pay the money still in his hands into court for the benefit of the creditors of the estate. Answers were filed by appellants, and upon trial to the court, there was a finding

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that the property in question was that of Edward C. Biggs at the time of his death, that it exceeded \$2,000 in value; that Wake was a *bona fide* purchaser. A decree was thereupon entered quieting title in Wake's grantee and requiring him to pay into court for the benefit of the creditors of the estate the sum of \$600 still in his hands, due on the purchase price. This he did. Appellants insist that this fund belongs to Nelle S. Biggs and should be paid to her. This constitutes the single inquiry presented by the record.

It is quite clearly established by the testimony that the conveyance by Edward C. Biggs and wife to Startzman was without consideration, and that the conveyance by Startzman, whether to E. C. Biggs or Nelle S. Biggs, was equally without consideration. This latter deed, which was never produced, and which was claimed to have been lost, is the basis of the claim of appellants, upon the theory that the grantee therein was Nelle S. Biggs, and that therefore the property was not that of E. C. Biggs at the time of his death. Concerning the question whether the grantee in this deed was Biggs or his wife, Nelle S. Biggs, there is a sharp conflict in the testimony. The testimony shows that the deed from Biggs and his wife to Startzman was returned to Biggs after it was recorded. Shortly before this deed was made, the testimony shows that Biggs attempted to make an arrangement with one Jones by which he was to convey the title to this property to Jones, the latter to give a deed back to Biggs, for the purpose of placing the property beyond the reach of some of Biggs' creditors. Jones declined to be a party to the proposed arrangement. It was shortly afterwards that the deed to Startzman was executed. It is further disclosed by the record that Biggs afterwards repeatedly stated that the property was his and that he had the deed for it. It is quite clear that the deed from Startzman to either Biggs or his wife was never delivered to the latter, although she seems to have been under the impression that she was the grantee therein. Accordingly, she made

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a search of her husband's papers shortly after his death. She was unable to find it, and thereupon the second deed, referred to as a substitute duplicate, was made to her. Biggs, after the property was conveyed to Startzman, contracted quite an amount of indebtedness and made some valuable improvements on the property, and it is contended by appellees, with some support in the record therefor, that the money of some of the creditors of the estate was used in paying off the \$1,000 mortgage on the property. However this may be, there is abundant testimony in the record to support the finding of the trial court that the first deed made by Startzman was to Edward C. Biggs, and that at the time of his death the property belonged to his estate. If this is true, clearly the value thereof, above the homestead exemption, would be liable for the satisfaction of the debts against the estate. Nelle S. Biggs, by the sale of the property to Wake, seems to have obtained more than the value of her homestead exemption, and it would seem only equitable that the small amount of the purchase price yet remaining should be paid to the creditors of Edward C. Biggs.

The judgment of the trial court is in all respects right, and it is therefore recommended that the same be affirmed.

HASTINGS and LOBINGIER, CC., concur.

AFFIRMED.

NATHANIEL BROWNFIELD V. ORLANDO J. BLEEKMAN.

FILED APRIL 22, 1903. No. 12,709.

Commissioner's opinion. Department No. 3.

Adverse Possession: BOUNDARIES: MISTAKE: INCLOSURE. When one by mistake enters upon and takes possession of the land of another, claiming it as his own to a definite and certain boundary, and continues in the open, notorious and exclusive possession thereof under such claim, for ten years or more, he acquires title thereto by adverse possession although the land was not inclosed.

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ERROR from the district court for Dawson county. Tried below before SULLIVAN, J. *Affirmed.*

E. A. Cook and G. W. Fox, for plaintiff in error.

E. D. Owens and Warrington & Stewart, contra.

ALBERT, C.

This is an action of ejectment and involves a disputed boundary between adjoining landowners. At the close of the testimony, the court directed a verdict for the defendant and from a judgment rendered thereon the plaintiff prosecutes error to this court.

It is conclusively established by the evidence that the parties to this action held a paper title to adjoining subdivisions of land, which are separated by government half-section lines. The location of that line was one of the matters in dispute in this case. The defendant acquired his title from one Hess, whose tenant in 1889 broke out and cultivated his land up to what is now claimed by the defendant as the true government line between him and the plaintiff. At the close of the testimony, the parties stipulated as follows:

"It is agreed by the parties, at this stage of the proceedings, that the land owned by the defendant was originally broken out substantially as testified to by the witness B. F. Garrison, and his son; that the owner Hess, from that time, which was in 1888 or 1889, continued to cultivate the land in dispute; during the time he held it as part of his land; and that, since the defendant purchased the land from Hess he has continued to cultivate the tract claiming it to be part of the land purchased by him from Hess; that Hess and the defendant, at all times, in cultivating and holding the possession of said land have done so believing that the same was their land and not the land of the plaintiff or his grantor. It is further agreed that the land of the plaintiff lying immediately east of the eighty owned by the defendant was wild, un-

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cultivated land up to 1893 and uninclosed, and that this defendant and his grantor have had continuous possession of the land under this claim as above set forth since 1888 or 1889, and it is stipulated that this agreement does not affect the testimony heretofore offered in this case."

The stipulation, fairly construed, amounts to this: that the defendant's grantor entered upon possession and cultivated the land in dispute in 1889, claiming it as a part of the government subdivision, belonging to him and continued in possession thereof, and to cultivate it under such claim, until his conveyance to the defendant, who thereupon entered upon possession and cultivated it under the same claim of right, and continued in possession and to cultivate the land under such claim, until after the commencement of this action, which was commenced on the 14th day of June, 1900. The court in directing a verdict proceeded on the theory that the cause of action was barred by section 6, Code of Civil Procedure, which provides that actions for the recovery of the title or possession of lands shall be brought within ten years after such cause of action shall have accrued. The plaintiff vigorously assails this theory and contends that the evidence tends to show that the land in dispute lies on his side of the government line and that the possession of the defendant and his grantor was the result of a mistake on their part as to the location of the true line, and that under such circumstances the defendant could not acquire title by adverse possession. This contention, if upheld, would amount to this, that a man who holds possession in the honest belief that he is within the true boundaries of his land would occupy a less advantageous position than the willful trespasser. We cannot believe that such is the law. Besides, this court has held that if one, by mistake, inclose the land of another and claim it as his own to certain fixed monuments or boundaries, his actual and uninterrupted possession for the statutory period will work a disseizin and his title will be perfect. *Tex v. Pflug*, 24 Neb., 666; *Levy v. Yerga*, 25 Neb., 764; *Obernalt v. Edgar*, 28 Neb., 70.

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The plaintiff does not overlook the cases cited but insists that the rule therein announced does not apply to the facts in this case, because the land was not inclosed and no fixed monuments were shown. It is true, in the three cases cited, the rule is announced in the same language and reference is made to fixed monuments and the inclosure of the land; but that the inclosure of the land is not an essential element of the rule, appears from the fact that, in the last of the cases cited, it does not appear the land was inclosed. The importance of the inclosure in any case, we think, is due to the fact that it renders the possession open and notorious and tends to show that it was exclusive. That this is not the only way by which possession may be rendered open and notorious is clear from one of the instructions, approved in *Obernalte v. Edgar, supra*, whereby the jury were instructed that "the actual possession of the land may arise in many different ways, and in any of the different ways of improving it which are open and notorious in their character, which show an intention to appropriate to some useful purpose—that is, by inclosing by fence, erecting buildings, planting groves or trees—going to indicate an appropriation of the property of the persons claiming to own it."

So far as concerns the fixed monuments, the petition, in this case, described the land in dispute with mathematical accuracy, and with reference to fixed and certain boundaries. The evidence and the stipulation show that for more than ten years previous to the commencement of this action the defendant and his grantor had occupied and cultivated the land in dispute, that is, the land described in the petition, successively, claiming it as their own; that being true, by reference to the stipulation and the petition, the boundaries are as fixed and ascertainable as though they had occupied and cultivated to a public road, as in the case last cited. The evidence shows that such possession was exclusive. We think the facts agreed upon by the stipulation of the parties and the evidence bring this case clearly within the meaning of the rule

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hereinbefore stated and that there was no error in directing a verdict for the defendant.

It is recommended that the judgment of the district court be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

HARVEY SPALDING V. THE CITY OF OMAHA.

FILED APRIL 22, 1903. No. 12,763.

Commissioner's opinion. Department No. 3.

Municipal Corporations: EMINENT DOMAIN: EASEMENT FOR STREETS: DAMAGES APPLIED TO TAXES: LIMITATION OF ACTIONS. The city of Omaha having, by the exercise of the power of eminent domain, acquired the possession of a strip of ground and an easement therein for street purposes, upon an award of damages to the landowner, and having by an order of its mayor and council refused to pay the amount of such award in money and directed it to be applied in satisfaction of special assessments for local improvements, a cause of action against the city for the recovery of the money accrued, if at all, immediately upon the termination of such proceedings.

ERROR from the district court for Douglas county.
Tried below before ESTELLE, J. *Affirmed.*

David Van Etten, for plaintiff in error.

W. J. Connell, contra.

AMES, C.

The petition alleges that more than four years prior to the beginning of this action, the city of Omaha, in the exercise of its power of eminent domain, established a right of way for a public street across certain land upon which the plaintiff had a valid and subsisting judicial lien. No objection is made to the regularity of the proceedings, and it is not disputed that the city obtained by means of them a valid easement and possession of the strip for street

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purposes. As a part of the proceedings an allowance of damages in the sum of \$844.75, was made to the persons having apparent titles or interests in the land, but a part thereof is alleged not to have been in fact paid and the plaintiff claims to be, and to have been, solely entitled to all of it, subject to an attorney's lien for the whole amount thereof in favor of his attorney in this case, Mr. David Van Etten. The petition prays that it be decreed that his judgment lien upon said land is valid, and that the defendant city is indebted to him by reason thereof, and of the premises, in the whole of said sum of \$844.75, and that the same is payable to said Van Etten and that a writ of mandamus issue to compel such payment.

It further appears from the record that all of the moneys so awarded as damages except the sum of \$270.32, which was paid to the plaintiff before the beginning of the action, has been applied by the city authorities in satisfaction of special assessments for local improvements charged against the lands in question. No attack is made upon the amount or validity of such assessments or of any of them, nor is any claim made that they have not been effectually discharged by the means mentioned.

The answer pleaded among other defenses the statute of limitations. The case was tried to the court without a jury, and a judgment of dismissal and for costs was rendered, from which this proceeding in error is prosecuted.

We think it sufficient to say that a cause of action for the condemnation money accrued to the plaintiff, or his predecessors in interest, if at all, immediately upon the termination of the proceedings in which the damages were awarded and the taking of possession of the strip by the city. If, as the plaintiff contends, the order of the city council, and the proceedings thereunder, withholding payment in money and directing the application of the amount of the damages in payment of special assessments were unlawful, they were themselves an explicit denial of the rights of the property owners and would have justified an immediate action without demand. These things were

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done more than five years before the beginning of this action.

It is therefore recommended that the judgment of the district court be affirmed.

ALBERT and DUFFIE, CC., concur.

AFFIRMED.

ALEXANDER STROWBRIDGE, APPELLANT, v. JACOB MILLER,
SHERIFF OF LINCOLN COUNTY, ET AL., APPELLEES.

FILED APRIL 22, 1903. No. 12,784.

Commissioner's opinion. Department No. 2.

1. **Process: SUMMONS: RETURNABLE ON HOLIDAY: VALIDITY.** A summons returnable on a legal holiday is not void, and is sufficient, if served in time, to require the defendant to appear on the first day thereafter in which the court can transact business.
2. **Process: SUMMONS: SERVICE OUT OF COUNTY: VALIDITY: TIME.** Where such summons appears to have been served on the defendant in another county than the one where suit is pending, by leaving a copy of it at his usual place of residence in his absence therefrom only two days before the return day thereof, such service is void, and will not support a judgment by default.
3. **Process: SUMMONS: SERVICE OUT OF COUNTY: KNOWLEDGE OF ACTION AFTER JUDGMENT: LACHES: INJUNCTION.** In such a case where the defendant does not return to his home for more than a month after such service of summons, and on his return does not find the copy of the writ and has no notice of any kind of the pendency of the action, or that a judgment has been rendered against him, until too late to avail himself of any legal remedy, he cannot be said to be guilty of laches, and may enjoin the collection of the judgment, where the fact that it is void appears upon the face of the record, and he has a good defense to the original action.
4. **Limitation of Actions: WHEN A GOOD DEFENSE.** The defense of the statute of limitations, if available at the time of the commencement of the original action, is a good defense.
5. **Justices of the Peace: JURISDICTION: PARTIES IN DIFFERENT COUNTIES: JOINDER COLLUSIVE: SUMMONS: JUDGMENT.** Where there is a collusive joinder of defendants in an action before a justice of the peace for the sole purpose of bringing a suit against a person in a county where he does not reside, a summons issued in such

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action to another county for the purpose of bringing in a defendant residing therein is void, and confers no jurisdiction on the court to render a default judgment against such a defendant.

APPEAL from the district court for Lincoln county. Tried below before GRIMES, J. *Reversed with directions.*

Hoagland & Hoagland, for appellant.

Wilcox & Halligan and *Warrington & Stewart*, contra.

BARNES, C.

The appellant commenced this action in the district court for Lincoln county, against Henry V. Temple, James S. Thomas and Jacob Miller, as the sheriff of said county, to restrain the collection of a certain judgment which was described and set out in his petition. It was charged in the amended petition in substance, as follows: That on the 16th day of November, 1895, the defendant, Henry V. Temple, commenced an action within the jurisdiction of a justice of the peace, before the county judge, or in the county court of Dawson county, against the plaintiff by the name of A. Strowbridge, J. M. Marcott and J. S. Thomas, to recover the sum of \$107.75, and interest on a promissory note dated March 13, 1888, and payable to James S. Thomas on or before August 13, 1888, signed by J. M. Marcott and A. Strowbridge, and upon which it was alleged there was a payment of \$20 made February 8, 1889; that summons was issued in that action and service thereof was accepted by J. S. Thomas, but no service was made upon either of the other defendants; that on November 21, 1895, the cause was continued by the court to November 28, 1895, and a summons was issued therein directing the sheriff, or any constable of Frontier county, Nebraska, to notify the defendant, A. Strowbridge, to appear in said court on November 28, 1895, which day was a legal holiday; that the summons is alleged to have been served upon the plaintiff by the name of A. Strowbridge, by leaving a copy thereof at his usual place of

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residence in Frontier county, Nebraska, on the 26th day of November, 1895; that on November 28, because that day was a legal holiday, the court continued the cause until November 29, 1895, without notice to the defendants therein; that on the 29th day of November, the court entered judgment in the action in favor of Henry V. Temple for \$153.46 and \$5.46 costs against the plaintiff by the name of A. Strowbridge, and against the defendant James S. Thomas by the name of J. S. Thomas, which judgment is against plaintiff as principal and J. S. Thomas as indorser; and such judgment has never been reversed, modified or in any manner set aside; that the record of the judgment shows that the summons therein alleged to have been served on the plaintiff, at his usual place of residence in Frontier county, was served by one Thomas Avery, constable; and the plaintiff alleges that at such time there was no constable by the name of Thomas Avery in said Frontier county, Nebraska; and no person of that name in said county who was authorized to serve such summons; that afterwards, on the 18th day of May, 1897, Henry V. Temple caused a transcript of the judgment to be filed in the office of the clerk of the district court for Lincoln county, Nebraska, and on the 6th day of August, 1897, caused an execution to be issued thereon by the clerk of said district court and placed in the hands of the defendant, Jacob Miller, sheriff, who by the direction of said Temple on August 9, 1897, levied the same upon the following described lands and tenements belonging to the plaintiff, to wit: the northwest quarter of section 7, township 11, range 26, in Lincoln county, Nebraska; that the sheriff has advertised said lands for sale under the execution, and is threatening to sell, and will sell the same, unless restrained by the order of the court. It was further alleged that the note that was the subject of the action was executed by J. M. Marcott to J. S. Thomas for farm machinery purchased by Marcott from Thomas, which farm machinery, with other property of Marcott, was mortgaged in the note as security therefor, to Thomas;

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that plaintiff signed the note solely as surety for Marcott and received no benefit of any kind or character, and no consideration for such transaction, all of which was well known by Thomas; that during a greater portion of the seven years from the maturity of the note up to the date when the action was commenced thereon, Marcott resided in Lincoln and Dawson counties, and owned property subject to the payment of the debt; and after the note became due Marcott sold a tract of land owned by him in Lincoln county for the sum of \$1,800; that after signing the note as surety, and from that time until long after the pretended judgment was entered, the plaintiff had no knowledge or notice of any kind that the note had not been paid; that before said action was commenced the plaintiff went away from his home in Frontier county and remained at work pressing hay in the North Platte valley in Lincoln county until about the first of January, 1896, and knew nothing about the commencement of the action, or that any summons had been served therein, or of any judgment therein until long after such judgment could have been opened, or an appeal could have been taken therefrom under the laws of this state; that until the defendant, sheriff, came to said land to levy upon and appraise it under the execution the plaintiff had no knowledge that a judgment on said note had been entered against him; that the cause of action upon the note accrued on the 13th day of October, 1888, and that more than five years had elapsed, to wit, seven years, one month and three days, before any suit was commenced thereon, during which time the plaintiff had made no promises nor done anything to prevent the commencement of an action, or prevent the running of the statute of limitations, and that at the commencement of the suit he had a complete defense against any action on the note, and that he would have interposed his defense had he known of the pendency of the action; that the bill of particulars filed in the action by Temple, showed upon its face that the note was barred by the statute of limitations, and therefore did not state

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a cause of action upon which a judgment could be based; that plaintiff has never by word, act or deed waived the statute of limitations, or made an appearance in said action, and does not waive the same but expressly asks that such statute be considered in his behalf; that at the time of the commencement of the action the plaintiff resided in Frontier county, Nebraska, and J. S. Thomas, the payee of the note, resided in Dawson county, Nebraska; that Thomas at that time was the real owner of the note, and for the fraudulent purpose of accepting service upon himself in said action in Dawson county and thus procure service on the plaintiff in Frontier county, said Thomas and Henry V. Temple fraudulently connived together and agreed that Thomas should indorse the note and become a defendant in the action for the purpose of procuring service of summons on the plaintiff in Frontier county; that Thomas was therefore only a nominal defendant in the action with no liability whatever therein, and was in fact the real owner of the note and the pretended judgment entered thereon; that the court in Dawson county acquired no jurisdiction to issue the summons and render the judgment against the plaintiff; that the pretended judgment is void, and should not be enforced, because no cause of action was presented to the county court of Dawson county by the plaintiff therein upon which to base the judgment; that said action was not rightfully or legally brought in Dawson county; that no legal summons was ever issued by the county court for the appearance or notification of the plaintiff; that no summons was ever legally served on the plaintiff in said action; that at the time of entering the judgment the county court of Dawson county had no jurisdiction of the person of the plaintiff; that the summons requiring the plaintiff to appear in court on a legal holiday was void; that the action of the county court in continuing the cause on a legal holiday was void; that the action of the court, continuing the cause to a legal holiday, was void; that the defendants, Henry V. Temple and James S. Thomas,

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fraudulently conspired to procure and did procure such pretended judgment against the plaintiff in his absence so as to prevent him from pleading the statute of limitations, well knowing that the note, at the time said action was commenced, was barred by the statute of limitations, and that the plaintiff would plead such bar if he had actual notice of the suit; that the bill of particulars filed in the action and the transcript thereof show that the action was barred by the statute of limitations; that the bill of particulars does not show that Henry V. Temple had any interest in the action at the time it was commenced, or that anything was due him on the note. It was further alleged that the plaintiff had no adequate remedy at law; that he would suffer great and irreparable loss unless the court, by a writ of injunction, should prevent the threatened sale of his property for the satisfaction of such pretended judgment. Plaintiff prayed the court to protect him from the threatened wrongs, and that the judgment be decreed to be void and of no force and effect, and that the defendants and each of them be enjoined from attempting in any manner to collect or enforce the pretended judgment against the plaintiff, and for general equitable relief.

We have thus epitomized the petition because it appears that the judgment of the court was based largely on the ground that it did not state facts sufficient to entitle the plaintiff to any relief. It may be further stated that the petition contained a copy of the note, which was also copied into the transcript, and it appears therefrom that it was not a negotiable instrument. It was in fact a mortgage and a note, all contained in the same instrument, and the signatures appended thereto were at the end of the mortgage clause contained therein.

Henry V. Temple by his answer admitted part of the allegation of the petition and denied others; alleged that by a clerical error the record and transcript of the judgment complained of was made to show that summons was served on plaintiff by one Thomas Avery, a constable,

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whereas in truth and in fact the summons was served by Thomas McAvoy, constable, and the return of said service was so signed; that the plaintiff's petition did not state facts sufficient to entitle the plaintiff to any relief, and he therefore prayed that the action might be dismissed as to him.

The sheriff by his answer admitted that he was the sheriff of Lincoln county; that he held an execution against the plaintiff; that he levied the same on the land described in the petition and was about to sell it under said execution; that as to the other matters and facts stated in the petition he had no knowledge and therefore denied the same. The answer of the defendant Thomas, was a copy of the one filed by Temple, and in addition thereto he denied that he and Temple fraudulently connived and entered into an agreement that he should indorse the note and become a defendant in the action for the purpose of procuring service of summons on the plaintiff in Frontier county, and denied that he was a nominal defendant in the original suit, and alleged that the note was sold and transferred to Temple, the plaintiff in that action, in the usual course of business for a valuable consideration.

An examination of the pleadings discloses that there was no denial of the allegation that the transcript showed that the summons, alleged to have been served on the plaintiff by leaving a copy at his usual place of residence in Frontier county, was served on the 26th day of November, and was returnable on the 28th day of the same month. The evidence was taken and the cause submitted, and on consideration thereof the court made the following findings: "That the petition does not state facts sufficient to entitle the plaintiff to the relief prayed for, and that the facts are not sufficient to entitle the plaintiff to the relief prayed for." Upon these findings the temporary injunction was dissolved, and the plaintiff's action dismissed. From that judgment the appellant prosecuted this appeal.

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The appellant contends that the court erred in holding that his petition did not state facts sufficient to entitle him to any relief. It may be stated at the outset that the continuance of the action to a legal holdiday, the making of the summons returnable on that day, and the continuance of the cause to the day following, is not sufficient ground to sustain a decree in favor of appellant.

In *Ostertag v. Galbraith*, 23 Neb., 730, it was held that "Where a writ is returnable on a day in which the court is precluded from transacting business, such writ will not be void, but the return day will be the first day thereafter in which the court may legally transact business." And where a cause is continued to a day in which the court is prohibited from transacting business, as Sunday or a legal holiday, the continuance will extend to the first day thereafter on which it can legally transact business. *State v. King*, 23 Neb., 540.

But it is alleged in the petition, and it appears by the transcript that the summons alleged to have been served on the appellant, by leaving a copy at his usual place of residence, was not served in time to confer jurisdiction over his person, and authorize the court to render a judgment against him by default. The petition alleges that the summons was returnable on the 28th day of November, 1895, and that no service thereof was attempted to be made until the 26th day of the same month. This allegation is borne out by the transcript and the evidence. Indeed it is doubtful if any attempt was ever made to serve it. The return on the writ, as set forth in the transcript, is as follows:

"Received this writ November 25, 1895, the within named A. Strowbridge by leaving a certified copy of this summons and all of the endorsements thereon at his usual place of residence. Dated this 26th day of November, 1895. Thomas Avery, constable."

The appellant testified that he was absent from his home from about November 1, 1895, to January, 1896; that on his return his wife told him that a paper had been left

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there for him but it was gone, and that he never saw it; that he did not know, and had no means of knowing or ascertaining, what the paper was; that there was no constable in Frontier county of the name of Thomas Avery on November 26, 1895.

The appellees sought to show, by what purported to be an original summons in the action, that there was a constable in that county of the name of Thomas McAvoy, and that the writ was in fact served by him. The transcript of the judgment on which an execution is issued when assailed must speak for itself, and cannot be changed or modified by parol evidence. The summons which was offered for that purpose showed on its face that it had been changed and altered as to its date after it was issued by the justice. It also appeared by the return itself that it had been changed and altered after it was made out and signed by the officer and returned into court, in this: that the date when it was received by the officer, which was originally written in black ink, had been partly erased, and the figures "25" written over it in green ink; that the alleged date of service had been changed from what appeared to be the 26th day of November, written in black ink, by erasure and writing over it the figures "25" in green ink, and the date of the officer's certificate had been changed so it showed a figure "2" in green ink and a figure "1" in black ink followed by a figure "5" in green ink, and what appeared to have been at one time a figure "6" in black ink. This discredited document, without explanation, could not be received in evidence to impeach the transcript. And so it may be fairly said that the summons was left at appellant's place of residence on the 26th day of November, 1895, and was returnable on the 28th day of the same month.

Section 1093 of the Code of Civil Procedure provides that, "The summons, execution, and every other paper made or issued by a justice must be filled up without a blank to be filled by another; otherwise it is void." It follows that the change or alteration of a summons after

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it is issued renders it void, and a judgment founded thereon is also void.

A summons in a civil action before a justice of the peace must be served at least three days before the time set for trial. Code of Civil Procedure, section 911; *Leake v. Gallogly*, 34 Neb., 857, 52 N. W. Rep., 824; *Muller v. Pluc*, 45 Neb., 701. In the case last cited it was held that "In an action before a justice of the peace, where the defendant does not appear, the record must show that legal service of the summons was made, or the judgment will be void." The appellant never in any manner appeared in the action in Dawson county. Indeed he could not have done so because it is established beyond question that he had no knowledge of its pendency until the execution issued on the transcript of the judgment therein, had been levied on his land. It follows that the court was without jurisdiction to render any judgment against him; that the judgment was void, and that fact appeared on the face of the record and transcript of the judgment itself.

It was further alleged in the petition that there was a collusive joinder of defendants in order to procure service of summons on the appellant in another county than the one where the action was brought, and that the summons was void because of said fact. There was evidence tending to establish that fact. The mortgage note, which was not a negotiable instrument, was payable to J. S. Thomas, or order; the original instrument, or a copy of it, was filed as a bill of particulars, and on the back of it appeared the name of J. S. Thomas as indorser; no allegation was made to charge him with any liability as such, and it appears in the evidence that Temple simply held the instrument, if at all, as collateral to a debt due him from Thomas. He could not tell how much, if anything, Thomas owed him, and he had no record of the note in his bank. In fact he was not able to give any satisfactory explanation in regard to it. Thomas testified that he did not know when he indorsed the instrument, or when he delivered it to Temple. Just why Temple should desire to procure a

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judgment against Thomas, on an instrument payable by a third party, which he claimed to hold simply as collateral to a debt already due him from Thomas, is not explained. So we hold that the evidence was sufficient to show a collusive joinder as charged in the petition, and in such a case the court obtains no jurisdiction over the person of the defendant so served.

It is well established that the defendant, who may be sued in the county where the action is brought, must be a necessary and not a sham defendant joined solely for the purpose of bringing in the defendant served in another county. *Dunn v. Haines*, 17 Neb., 560, 23 N. W. Rep., 501; *Cobbey v. Wright*, 23 Neb., 250, 36 N. W. Rep., 505, 29 Neb., at page 277, 45 N. W. Rep., 460; *Hanna v. Emerson*, 45 Neb., at page 710, 64 N. W. Rep., 229; *Miller v. Mecker*, 54 Neb., at page 453, 74 N. W. Rep., 962; *Stewart v. Rosengren*, 66 Neb., 445, 92 N. W. Rep., 586; *Siever v. Union P. R. Co.*, — Neb., —, 93 N. W. Rep., 943.

It is alleged in the petition, and appears in the evidence, that the appellant had no actual notice of the pendency of the action against him in Dawson county; that he had no knowledge or notice of any kind that a judgment had been rendered against him in said action until the execution, issued on a transcript of such judgment, was levied on his land. Therefore, he was not guilty of any laches in failing to protect himself by proceedings at law, and in not making his defense to the action, if any he had. This brings us to the question of his defense. It is apparent on the face of the proceedings that when the suit was commenced an action on the instrument in question was barred by the statute of limitations. It also appears that the appellant has never had his day in court, or any opportunity to present that defense. It is true that the defense of the statute of limitations is a personal one, and where a party has been regularly summoned and fails to interpose such defense it will be considered waived. But one cannot be held to have waived his defense until he has had an opportunity to make it.

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This court has always held that the statute of limitations is a statute of repose; that as such this defense is favored in law equally with any other. We therefore hold that the appellant has shown that he had a good defense to the cause of action upon which judgment was rendered against him; that he has not waived it; that he has never had his day in court; that he has no adequate remedy at law in the premises, and that the findings and decree of the trial court, on the pleadings and the evidence, should have been in his favor.

We therefore recommend that the judgment of the trial court be reversed, and the cause remanded with directions to enter a decree for the appellant restraining the appellees from in any manner attempting to enforce the judgment complained of, against him, in accordance with the prayer of his petition.

OLDHAM, C., concurs in the result.

The judgment of the district court is reversed and the cause remanded with directions to said court to enter a decree restraining the collection of the judgment complained of and set forth in appellant's petition in accordance with the prayer thereof.

REVERSED WITH DIRECTIONS.

POUND, C., concurring.

I concur in recommending a judgment of reversal with directions to enter a decree as prayed for. I do this on the ground that a summons served on a defendant in another county than that in which the cause is pending, but two days before the return day thereof, will not support a judgment by default. I agree to and concur in the opinion of my brother BARNES upon this point, and also upon the point as to the validity of a summons returnable on a legal holiday, as to the right of the appellant to maintain a suit for injunction under the circumstances of the case at bar, and as to the availability of the de-

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fense of the statute of limitations under the circumstances involved in this case. But I am not able to agree to that portion of the opinion in which it is held that collusive joinder of defendants for the sole purpose of bringing a suit against a defendant in a county other than that of his residence may be availed of collaterally where a judgment by default has been rendered on service based upon such collusive joinder. It is undoubtedly true that a defendant is privileged from suit in a county other than his residence, unless he is properly joined as a defendant with some other party against whom there is a *bona fide* cause of action in the county where the action is brought. But this is a personal privilege which he may waive if he chooses. Section 96, Code of Civil Procedure, provides that where want of jurisdiction over the person does not appear on the face of the record, it must be set up by answer, and if not set up by answer will be waived. In *Baker v. Union Stock Yards National Bank*, 63 Neb., 801, 89 N. W. Rep., 269, this court held that in such a case the defendant must plead want of jurisdiction as soon as called upon to answer, and that if he answers without so doing, he cannot afterwards make the defense in an amended answer. For the same reasons, if he fails to set it up by answer and suffers judgment by default, he must be held to have waived the defense. Having waived it, he cannot use such defense thereafter as the basis of a collateral attack upon the judgment.

HENRY D. RHEA ET AL. V. CLARK K. BROWN ET AL.

FILED APRIL 22, 1903. No. 12,800.

Commissioner's opinion. Department No. 2.

1. Courts: APPEAL AND ERROR: PROBATE MATTERS: JURISDICTION. In appeals in probate proceedings under sections 42 to 48, chapter 20, Compiled Statutes [Annotated Statutes, sections 4806 to 4812], the district court acquires jurisdiction of the appeal upon filing of a transcript.

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2. Courts: APPEAL AND ERROR: PROBATE MATTERS: SUPERSEDEAS: DISMISSAL. If the appeal is one in which a bond is required, it will be dismissed in case no bond was furnished within the time fixed.
3. Courts: APPEAL AND ERROR: PROBATE MATTERS: JURISDICTION: SUPERSEDEAS: ESTOPPEL. But the district court has jurisdiction after the transcript is filed to determine whether or not a bond was necessary, and if it holds that none was required, and the appeal proceeds to a final judgment which remains unmodified and in full force, such judgment is conclusive upon the parties, and cannot be attacked collaterally for the failure to give bond.

ERROR from the district court for Dawson county.
Tried below before SULLIVAN, J. *Affirmed.*

H. D. Rhea, for plaintiffs in error.

George W. Fox and Edward A. Cook, contra.

POUND, C.

The defendants, Brown and Claypool, were administrators of the estate of one Henry Billiter, deceased. Upon final accounting, the county court found that they were indebted to the estate in the sum of \$1,094.80 and rendered judgment against them accordingly. From this judgment the defendants appealed to the district court, giving no bond, upon the theory that under section 44, chapter 20, and section 234, chapter 23, Compiled Statutes [Annotated Statutes, sections 4808, 5099], none was necessary. A motion was made in the district court to dismiss the appeal for failure to give bond, and, upon hearing, was overruled. The cause then proceeded to trial, when it was found that but \$85.60 were due from the defendants to the estate, and final judgment was rendered accordingly. Proceedings were had in the supreme court to review this judgment and to review the order overruling the motion to dismiss the appeal, but these proceedings were dismissed, and the judgment of the district court on the appeal remains unmodified and in full force. The present suit is brought upon the bond of the administrators to recover the full sum originally found due in the county

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court, upon the theory that all the proceedings in the district court and subsequent thereto were void and of no effect for failure to give bond. The defendants in their answer set up the proceedings on the appeal. Upon demurrer to this answer and motion for judgment on the pleadings, judgment was rendered for the defendants.

We think the judgment of the district court was right and should be affirmed. It is not necessary to consider whether the appeal was one in which a bond should have been given. It may well be said that section 44, chapter 20, and section 234, chapter 23, Compiled Statutes [Annotated Statutes, sections 4808, 5099], rightly construed, mean only that executors, administrators and guardians are not required to give bond when they appeal in their representative capacities, and that when they appeal in their personal capacities, from judgments rendered against them personally, they should give bond the same as other litigants. That question, however, is not before us. Sections 234 to 238, chapter 23, Compiled Statutes [Annotated Statutes, sections 5099-5103], are superseded by sections 42 to 48, chapter 20, Compiled Statutes [Annotated Statutes, sections 4806-4812]. *Davis v. Davis*, 27 Neb., 859. Hence we must look to the latter sections in determining whether or not the district court had jurisdiction. Section 46, chapter 20, Compiled Statutes [Annotated Statutes, section 4810], provides expressly that the district court shall acquire jurisdiction of the appeal upon filing of a transcript. Undoubtedly if the appeal is one in which a bond is required it will be dismissed in case no bond was furnished within the time fixed. But as bonds are not required on all appeals, and the question must sometimes arise whether a bond is required in a particular appeal, the district court clearly has jurisdiction, after filing of the transcript, to decide whether it is necessary in the particular case, and if it holds that none is necessary, and the appeal proceeds to a final judgment, which remains unmodified and in full force, such judgment is conclusive upon the parties and cannot be at-

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tacked collaterally for the failure to give a bond. We need not consider what would be the effect of failure to give a bond in cases where such bond is jurisdictional. Under sections 44 and 45, chapter 20, Compiled Statutes [Annotated Statutes, sections 4808, 4809], there is no doubt that in cases where a bond is required under those sections it is a necessary prerequisite to the appeal in default of which the appeal must be dismissed. But the dismissal in such case is for failure to give the bond, not for want of jurisdiction. So long as it is expressly enacted that the district court "shall be possessed of the action" upon filing of the transcript, we think it clear that the proceedings on the appeal were at most erroneous and not void.

We therefore recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

ANNA ADAMS, APPELLEE, v. GEORGE W. MILLER, APPELLANT.

FILED APRIL 22, 1903. No. 12,803.

Commissioner's opinion. Department No. 1.

Injunction: BY GENERAL CREDITOR: TO PREVENT TRANSFER OF PROPERTY.

"A mere general creditor, who has not reduced his claim to judgment, cannot maintain an action to enjoin a debtor from transferring his property." *Crowell v. Horacek*, 12 Neb., 622.

APPEAL from the district court for Dawson county. Tried below before SULLIVAN, J. *Reversed and dismissed.*

Warrington & Stewart and *Edward A. Cook*, for appellant.

H. D. Rhea and *W. W. Leek*, contra.

HASTINGS, C.

This is an appeal from a decree of injunction entered in the district court in which the defendant, George W.

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Miller, was required to surrender a promissory note which was found to be the property of one Patrick Priel, to be applied in satisfaction of execution in favor of the plaintiff, Anna Adams, against Patrick Priel. The appealing defendant, Miller, says that the plaintiff's petition fails to state a cause of action against him; that no evidence was introduced that Priel was insolvent, and that the evidence does not support the finding as to the ownership of the notes any more than it does as to the insolvency of Priel.

It is alleged that the petition should be dismissed upon the record of facts. The petition of the plaintiff states that she had commenced an action in Dawson county against Patrick Priel to recover damages for breach of promise of marriage; that Priel shortly before the institution of that action fraudulently conveyed one hundred and sixty acres of land in Dawson county to his brother, William Priel, to defraud and defeat plaintiff in that action; that the land was so conveyed for the alleged consideration of \$4,000, \$3,600 of which were in promissory notes of the grantee William Priel; that on June 19, 1901, Patrick Priel pretended to assign these notes to the defendant, Miller, but that such assignment was without consideration and merely for the sake of preventing any collection by plaintiff of her judgment which she might recover in her breach of promise action; that the defendant, Miller, was threatening to transfer the notes and mortgage without consideration to his mother-in-law in furtherance of the purpose to defraud the plaintiff; that Patrick Priel was insolvent and would be wholly unable to meet any judgment that plaintiff might recover; that plaintiff was without adequate remedy at law and would lose her claim unless Patrick Priel and Miller were enjoined from transferring or making sale of the notes and mortgage. An injunction was asked restraining Miller from transferring any of these notes until after plaintiff's action against Priel should be decided,

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and from attempting to collect the money on any of the securities he might hold against Patrick Priel.

Defendant Miller filed a motion to dissolve the injunction on the ground that the petition was insufficient to authorize it. He also filed a demurrer to the petition. This last seems never to have been acted upon. The motion was sustained as to the last two of the three \$1,200 notes, but was overruled as to the first of them and the injunction was continued in force. At the final hearing Miller was found, as above stated, not to be the owner of the \$1,200 note. The injunction was made perpetual and he was directed to surrender this \$1,200 note for the satisfaction of the plaintiff's judgment against Priel.

There is no brief on file on behalf of the plaintiff, but we are constrained to think that the case before us is simply one in which the plaintiff in an action pending seeks an injunction against the defendant and his grantee to prevent the transferring of property. The evidence seems to be sufficient to warrant the court in finding that the notes in question were at the commencement of the action the property of Patrick Priel. There seems to be no evidence that Priel was insolvent, and it would seem that under the former holdings of this court there was no authority to issue an injunction or interfere with the transfer in support of an action for breach of contract of marriage in which no attachment was issued, and no judgment yet rendered. *Crowell v. Horacek*, 12 Neb., 622.

There was no cause of action alleged in this petition and it is recommended that the decree rendered upon it be reversed and the action dismissed.

KIRKPATRICK and LOBINGIER, CC., concur.

REVERSED AND DISMISSED.

Paul v. Cook.

N. J. PAUL ET AL. V. H. L. COOK ET AL.

FILED APRIL 30, 1903. No. 12,544.

Commissioner's opinion. Department No. 1.

Party Walls: DAMAGES: CONTRACTS: EVIDENCE. In an action by the first builder under a party wall agreement against his grantees of the lot and building for alleged injuries to the wall by constructing windows therein, where there is no evidence as to how much these have impaired the usefulness of the wall, nor that the second builder or other party to the contract is desirous of using the wall or prevented from so doing by reason of the existence of the windows, and no showing of other damage, there is such a failure of proof as will warrant a finding for the defendants.

ERROR from the district court for Howard county.
Tried below before THOMPSON, J. *Affirmed.*

J. A. Haggart and Kendall & Kendall, for plaintiffs in error.

T. T. Bell, contra.

LOBINGIER, C.

This is an action to recover for alleged injuries to a party wall erected by virtue of an agreement made March 17, 1892, between plaintiffs in error Enevoldsen and one Philipina Becker, executrix of the estate of John P. Becker, deceased. The facts are in part identical with those in *Cook v. Paul, ante*, page 93, but the opposite wall of the building is here involved and the Becker estate is the owner of the lot upon which one-half of this party wall is located. The agreement in question, after prescribing the dimensions of the wall, provides:

"In consideration of the above agreements to be performed by the party of the first part, the party of the second part as executrix of the said estate and for and in behalf of the estate of the said John P. Becker, deceased, promises and agrees that said estate shall pay to the party of the first part the sum of ten dollars per thousand for all brick laid in the one-half of the west wall of said building as aforesaid, said payment to be made at the

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time when the executor of said estate or the heirs or assigns of the heirs of said estate or the legal owners or holders of said lot seven shall erect or cause to be erected upon said lot seven a brick building which shall lie immediately west of the building to be erected as herein set forth."

Up to the time of the commencement of this action on March 5, 1900, no building had been erected and no use had ever been made of the wall from that side. On December 1, 1899, however, defendants in error, who are now by *mesne* conveyances owners of the lot where the building stands, caused openings to be made and windows to be constructed in the wall which are also provided with shutters. We have already decided, in *Cook v. Paul*, *supra*, that an agreement like the above is personal and does not run with the land. As in that case plaintiff in error Paul sues as the assignee for collateral security of the contract, joining with him Enevoldsen, the original contractee. The analogy between the two cases, however, ends here, for not only has the wall stood for more than eight years without being used from the side of the Becker lot, but there is no averment or evidence that the Becker estate or any other party is desirous of using the same or is prevented from doing so by reason of the construction of these windows. The petition contains, indeed, the averment: "That by reason of the cutting of said openings in said wall as aforesaid, the value of said wall as a party wall has been entirely destroyed and said wall cannot now be used as a party wall." But no evidence was offered in support of this allegation and it is apparent from plaintiffs in error's brief that this claim rests upon the contention that a party wall must be a solid wall and that its character as such is destroyed when any breach or opening is made. There are, indeed, cases in which the statement appears in the opinion that a party wall must be solid and without openings. *Vollmer's Appeal*, 61 Pa. St., at page 128; *Vansyckel v. Tyron*, 6 Phila., 401; *St. John v. Sweeney*, 59 How. Pr. [N. Y.], 175. But these

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were cases where the second builder was complaining and not, as here, the party entitled to compensation for the use of the wall. We are cited to no case, and have found none, where damages equal to the entire compensation fixed for the use of the wall were allowed because of such openings. If the Becker estate were actually using or desirous of using the wall there is no doubt under the authorities but that it would be entitled to an injunction to prevent these apertures from being made. See, in addition to the cases above cited, *Sullivan v. Graffort*, 35 Ia., 531; *Dauenhauer v. Devine*, 51 Tex., 480. Compare *Calmelet v. Siehl*, 48 Neb., 505. It may even be conceded that plaintiffs in error would have been entitled to have their contingent right protected by injunction, for they alleged that they warned defendants and forbade them to proceed "at the time of so doing and before said openings or either of them had been fully cut through," but there is a failure to make a case for damages. There is no proof that the wall was weakened or in any way injured by the openings, nor is it alleged or proved that any one would have used the wall but for the existence of these windows, or that plaintiffs were deprived of an opportunity to obtain compensation for the use of the wall because these openings were made. It will be seen that the contract does not require the executrix of the Becker estate to use the wall; it merely gives her the option to do so and fixes the compensation in case she does. Until she or some of her assigns elects to exercise this option and uses the wall, plaintiffs' rights are wholly contingent and inchoate. We do not say that they could recover in no case for an injury to the wall until some one had used it, but we do hold that there must be competent evidence of such an injury by showing either deterioration in the value of the wall or that some one was prevented from using it who would otherwise have done so.

We might infer that these two windows would have some effect to lessen the value of the wall as a party wall, but we cannot presume that they would damage it in any specific

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amount, and certainly not that they would, as claimed, entirely destroy it. As to the extent of this injury, the bill of exceptions is wholly silent outside of the one item as to the size of the windows. For aught that appears, the executrix of the Becker estate or her assigns may be willing to use the wall when they desire to do so, relying on their right either to a deduction from their contract price on account of the existence of the windows or to close the apertures and claim a set-off by reason of expense thereof. Either course would afford a measure of the damage which plaintiffs have suffered, but there is no evidence in the record from which the trial court, which tried the cause without a jury, could have estimated them.

We have not found it necessary to consider the contention of defendants that the executrix of the Becker estate had no power to make this contract. That defense was available only to the parties interested in the estate. And had the wall been used under the contract, the defense could hardly have been made even if the contract was originally *ultra vires*. The tendency of the decisions seems to be toward holding the second builder, even without a contract. As was said by Holmes, C. J., in *Lincoln v. Burrage*, 177 Mass., at page 380:

“When a duty to pay for a party wall is recognized between owners who have not contracted together personally, it seems likely that it will be worked out in terms of implied contract, as it was in *Irving v Turnbull*, 2 Q. B. [1900], 129.”

We do not, moreover, determine the question whether this action was prematurely brought nor whether any cause of action arose until there had been some attempt or manifestation of desire to use the wall. We rest our decision wholly on the ground of failure of proof of damages, and because of this, we recommend that the judgment be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

Benedict v. T. L. V. Land and Cattle Co.

B. LINCOLN BENEDICT, EXECUTOR OF THE ESTATE OF CHARLES L. BENEDICT, DECEASED, APPELLEE, V. THE T. L. V. LAND AND CATTLE COMPANY ET AL., APPELLANTS.

FILED APRIL 30, 1903. No. 12,703.

Commissioner's opinion. Department No. 1.

1. **Receiver: CREDITORS' SUIT: APPEAL BY PLAINTIFF.** A plaintiff in a creditors' bill, who has been awarded a sale of lands but appeals from the decree because it refuses him any right against personal property, will not be refused the appointment of a receiver in the action on the ground that the lands have been conveyed by the judgment debtor subject to all its debts and liabilities.
2. **Receiver: CREDITORS' SUIT: APPEAL BY PLAINTIFF.** Neither will such a creditor be refused a receiver merely because his remedy by sale of the land is suspended by his own appeal.

APPEAL from the district court for Lincoln county.
Tried below before GRIMES, J. *Affirmed.*

Wilcox & Halligan, for appellants.

Hoagland & Hoagland, contra.

HASTINGS, C.

But one question is raised upon this record as presented before us, and that is the sufficiency of the plaintiff's petition for the appointment of a receiver. It alleges that Chas. L. Benedict, as plaintiff, in October, 1897, filed in the district court a creditors' bill, whose object was among other things to subject the lands, for whose control the receiver is asked, to the lien of his judgment rendered in Douglas county in December, 1894, for \$13,500 and costs; that Chas. Benedict died pending the creditors' bill action and the action was revived in the name of the present plaintiff; that a decree was rendered in that action to the effect that the judgment was a lien upon the lands and an order of sale of them awarded, but upon other

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points involved the plaintiff appealed from the decree to the supreme court of Nebraska, where the action is alleged to be still pending.

The petition alleges unpaid taxes upon the lands in question to the amount of \$500; that there is a prior mortgage of \$25,000 and that they are not of sufficient value to pay the mortgage, the taxes, and plaintiff's judgment; that the defendants are in possession and receiving the rents and profits and permitting the taxes, as also the interest on the first mortgage to accumulate and are paying no part of the incumbrances; that the Central Nebraska Land and Cattle Company, and the T. L. V. Land and Cattle Company, against which latter the \$13,500 judgment was rendered, are both insolvent, as is also James E. Riley, and that the Tierney Bros. and Chas. F. Tierney are in possession of the premises as tenants of Riley. Copies of the petition and decree in the original creditor's bill action are attached to this application for a receiver, and they show that the original action was an effort to appropriate these lands, together with a large amount of personal property, all of which is alleged to have originally belonged to the T. L. V. Land and Cattle Company, the judgment debtor, and to have been fraudulently conveyed, to the payment of plaintiff's judgment. The trial court found against plaintiff's claim as to the personal property but in his favor as to the lands which the T. L. V. Land and Cattle Company had conveyed to the Central Nebraska Land and Cattle Company "subject to all the debts and liabilities of the said T. L. V. Land and Cattle Company."

Plaintiff's claim is that, having appealed from this decree, he can not avail himself of the order of sale for the lands which is awarded by it, and that therefore he is entitled to have the rents and profits preserved for the ultimate satisfaction of his judgment by a receiver pending the appeal. The contention of the defendants is that the land having been conveyed to the present holder "subject to all debts and liabilities of the T. L. V. Land

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and Cattle Company," it is subject at once to execution without the aid of any decree of the court or other special proceedings, and it being so subject to execution for the payment of plaintiff's claim, there can be no receiver appointed.

It is also urged by the defendants that the plaintiff, in refusing to accept this decree and avail himself of the award of an order of sale, is depriving himself of his remedy and can not be permitted at the same time to refuse that by his appeal and to ask for a receiver.

We are constrained to think that neither of these objections of the defendants is well taken. The title to these lands has been conveyed to a third party who was in no way a party to the judgment; the legal title is in the Central Nebraska Land and Cattle Company; a sale on execution under judgment against the T. L. V. Land and Cattle Company would be inoperative to convey the legal title or to give possession, the conveyance having been placed of record before the filing of a transcript of plaintiff's judgment. The deed to the third party would remain as a cloud upon the title, and no summary remedy would lie against the grantee for possession. The legal title would still be in the grantee and a right to redeem it by payment of the judgment would remain unaffected by a sale under such judgment.

The objection that the plaintiff has taken an appeal from the decree awarding him an order of sale of these premises does not seem to us any better. The appeal is from another portion of the decree. It does not in any way repudiate such right as the decree gave the plaintiff to the satisfaction of his claim out of these lands. It is not denied that the lands are insufficient for this purpose. It seems clear that the acceptance of a portion of this decree would prevent plaintiff from appealing against the remainder of it. It would seem that plaintiff should be allowed to hold the rents and profits of this land within reach of process of the court until the final determination of his action.

Anderson v. Drees.

It is recommended that the order of the district court appointing a receiver be affirmed.

KIRKPATRICK, C., concurs.

AFFIRMED.

CARL ANDERSON V. JOHN DREES.

FILED APRIL 30, 1903. No. 12,714.

Commissioner's opinion. Department No. 3.

Conversion: SET-OFF AND COUNTER-CLAIM: EVIDENCE SUFFICIENT. Evidence examined and found to support the verdict.

ERROR from the district court for Cedar county. Tried below before GRAVES, J. *Affirmed.*

A. M. Gooding, for plaintiff in error.

R. J. Millard and *C. H. Whitney*, contra.

DUFFIE, C.

Drees, the defendant in error, sued Anderson for the sum of \$25, \$15 of which was for growing hay sold to him, and \$10 for the conversion of straw. The answer was a general denial and a counter-claim for \$75 damages alleged to have been sustained in consequence of Drees refusing to allow the defendant the use of twelve acres of land which he claimed to have rented from him for the year 1900. A verdict was returned in favor of the plaintiff below for \$15 and the defendant has brought the case here upon error.

Numerous assignments are made and argued relating to the insufficiency of the evidence to sustain the verdict and to alleged errors in the instructions of the court. The evidence is undisputed that Drees sold Anderson a field of hay for the sum of \$15 and that Anderson cut

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and appropriated the hay. In the progress of the trial it developed that the twelve acres which Anderson claimed he rented from Drees for the year 1900 was owned by Drees and his brother jointly, and it is assumed on the argument in this court that the growing hay sold by Drees to Anderson was also on land owned by the two brothers. There is absolutely no evidence that such is the case and the claim is made in this court for the first time. It was not urged in the trial court nor was it assigned in the motion for a new trial; therefore we can not consider it. Objections are taken to the instructions of the court relating to the value of the straw for which the plaintiff below made claim, or rather it is urged that no proper measure of damages was given for the guidance of the jury. Conceding that the instructions were erroneous, the plaintiff in error could not have been prejudiced thereby. The verdict was for \$15. The undisputed evidence shows that the hay was sold for that sum, and the presumption obtains that the verdict of the jury was for the hay alone, there being no question made as to the contract of sale nor the price agreed upon for the hay. The jury evidently disregarded the claim of the plaintiff below for the straw taken.

Relating to the counter-claim of the defendant, the evidence shows that the average yield of corn upon land of the quality of that claimed to have been rented was from thirty-five to forty bushels per acre, and that the market price of corn in the fall of 1900 was from twenty to thirty-five cents per bushel. It is further shown that the cost of raising corn was from \$4.30 to \$4.80 per acre. Anderson, according to his own testimony, was to pay one-third of the corn raised upon the premises as rent. If the jury accepted the highest estimated price of raising the corn, and the lowest market value of the corn in the fall, it will be seen that Anderson would not have reaped any benefit from the use of the land, the cost of raising the crop being equal or greater than his share of the proceeds.

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The jury evidently took a correct view of the case and we recommend an affirmance of the judgment.

ALBERT and AMES, CC., concur.

AFFIRMED.

GOTTLIEB J. HESS ET AL. V. WILLIAM LELL ET AL.

FILED APRIL 30, 1903. No. 12,779.

Commissioner's opinion. Department No. 2.

Injunction: QUIETING TITLE: PLEADING: ADEQUATE REMEDY AT LAW.

Petition examined and *held* to affirmatively show that petitioner had an adequate remedy at law which he neglected to pursue, and that it therefore fails to state a cause of action for equitable relief. *Hobson v. Cummins*, 57 Neb., 611, followed.

ERROR from the district court for Holt county. Tried below before HARRINGTON, J. *Reversed with directions.*

Geo. M. Nicholson, for plaintiffs in error.

M. F. Harrington, contra.

GLANVILLE, C.

This is an action commenced by the defendant in error, William Lell, in the district court for Holt county, to restrain the collection of a judgment rendered against him in justice court in Lancaster county, and to quiet title to certain real estate in Holt county against the lien of the judgment which had been duly transcribed and docketed in that county. The plaintiffs in error were made defendants to the action and demurred to the petition upon the ground that it does not state facts sufficient to constitute a cause of action. Their demurrer being overruled, they, having excepted, elected to stand thereon, and judgment was rendered against them according to the prayer of the petition. The case is brought here upon petition in error, questioning the correctness of the ruling of the dis-

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strict court upon the demurrer, and its judgment upon the petition.

The judgment in question was rendered upon a promissory note given by the defendant in error, which he claims was fraudulently procured by J. A. Huddelson as the agent of Anna M. Huddelson, his wife, and which he claims to have repudiated long before the action was brought, and which he also alleges was then barred by the statute of limitations.

That portion of the petition which it is necessary to consider in determining this case is as follows:

"That for the fraudulent and illegal purpose of enforcing said note of \$70.60 against this plaintiff, and the fraudulent and illegal purpose of recovering a judgment against this plaintiff on said note, the defendant J. A. Huddelson caused said note to be indorsed over to him, without recourse, by Anna M. Huddelson and delivered the same to the defendants Hess and Salisbury, his attorneys. That the defendants Hess and Salisbury then instituted an action before one Fritz Westermann, a justice of the peace of Lancaster county, Nebraska, on the said \$70.60 note, against this plaintiff, and J. A. Huddelson in the month of June, 1900. That said J. A. Huddelson was in no manner liable on said note and neither was this plaintiff, and said J. A. Huddelson was only joined as a defendant for the fraudulent purpose of vesting said justice of the peace with apparent jurisdiction over this plaintiff. That a summons was thereupon served on said J. A. Huddelson in said action on the 28th day of June, 1900, and on the 30th day of June a summons was served on this defendant in Holt county in said action, and no other service was ever made on this plaintiff in said action and this plaintiff never entered any appearance in said action. That said cause was tried before said justice of the peace on the 9th day of July, 1900, and in his own behalf and by the procurement of the plaintiffs in that action and by collusion with them the said J. A. Huddelson falsely, knowingly and feloniously testified to the following facts, knowing

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the same to be false. That in the trial before said justice of the peace said J. A. Huddelson testified that this plaintiff in the city of O'Neill, Nebraska, in the spring of 1895, had signed a written agreement extending the time of payment of said note until the first day of October, 1895, and he further testified that he had lost or mislaid said written agreement. That all of said testimony was material in said action and was for the express purpose of preventing the running of the statute of limitations. That this defendant never signed any agreement for any extension of the time of the payment of said note. That by said testimony the said court was imposed upon and said court believed the testimony of said J. A. Huddelson and thereupon judgment was entered in said action in favor of Hess and Salisbury and against this plaintiff, and J. A. Huddelson for one hundred thirteen dollars and sixty cents and costs taxed at \$6.80."

Conceding that the entire petition states facts constituting a meritorious defense to the action upon the note, and also conceding that it states facts constituting a good plea in abatement to the action as brought in Lancaster county, yet we think the demurrer should have been sustained.

The petition states, "This plaintiff never entered any appearance in said action." The defense of the statute of limitations was therefore waived and the testimony of J. A. Huddelson complained of was irrelevant, did not bear upon any issue, was entirely unnecessary to the determination of their action, and cannot be made the basis of an action to cancel the judgment as having been obtained by fraud. There is no other allegation that the plaintiffs in any manner procured the judgment by fraud, except that the said J. A. Huddelson was joined as a defendant for the fraudulent purpose of allowing the justice of the peace in Lancaster county to obtain jurisdiction over the defendant Lell.

The petition shows that Huddelson was joined as a defendant and served with summons in Lancaster county, that the defendant Lell was served with summons in

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Holt county, that judgment was rendered against both Huddelson and Lell, and that the defendant Lell made no appearance in said action. He could have appeared and pleaded that the action was not prosecuted in the name of the real party in interest, that the action was barred by the statute of limitations, or any other defense to the action, and at the same time questioned the jurisdiction of the court by proper averments as to Huddelson's liability, and collusion between him and the plaintiffs. The defendant Lell therefore had a plain, adequate remedy at law which he neglected, but rather allowed judgment to go against him by default in an action wherein the service of summons appears upon the face of the record to have been regular and sufficient to give the court jurisdiction.

The case of *Mayer v. Nelson*, 54 Neb., 434, was one where a defendant was served with summons in Lancaster county while attending court therein in response to a subpoena. He appeared specially challenging the jurisdiction of the court, and when his objection to the jurisdiction of the court was overruled he failed to appear further, but allowed judgment to go against him by default. He afterward attempted to restrain its collection by proceeding in equity, and this court dismissed his action because "a court of equity will not enjoin the enforcement of a judgment of a justice of the peace where it appears that a plain and adequate remedy existed at law." In that opinion NORVAL, J., uses the following language:

"Nelson had an adequate remedy at law by appealing from the judgment or prosecuting a petition in error to the district court. *Hurlburt v. Palmer*, 39 Neb., 158; *Anheuser-Busch Brewing Association v. Peterson*, 41 Neb., 897; *Dunn v. Haines*, 17 Neb., 560. The doctrine of these cases is that an objection to the jurisdiction of the court over the person is not waived by appealing or prosecuting an error proceeding, and that the want of jurisdiction, which is not disclosed by the face of the record, may be set up by answer. As a plain and adequate remedy existed

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at law, a court of equity will not enjoin the enforcement of the judgment rendered by the justice. *Gould v. Loughran*, 19 Neb., 392; *Langley v. Ashe*, 38 Neb., 53. * * * Plaintiff below has mistaken his remedy. The decree is reversed and the action dismissed."

We think the decision in that case is decisive of the case before us, and that the demurrer to the petition is good.

A case more exactly in point, perhaps, is *Hobson v. Cummins*, 57 Neb., 611, wherein a petition was filed asking a court of equity to restrain the collection of a judgment, and a general demurrer to the petition having been overruled the defendant elected to stand and a decree was rendered against him. This court reversed the case, and the opinion contains the following language:

"In the action in which the judgment sought to be enjoined was rendered Hayden was served with process in Red Willow county, and summons was issued to, and was served upon, Cummins in Dawson county. Neither defendant appeared in the action. It is now argued that the county court of Red Willow county did not acquire jurisdiction over the person of Cummins, for the reason that Hayden was a nominal defendant merely, and the service of summons upon him in the county in which the writ issued conferred no power to summon the other defendant in another county. The doctrine announced by this court in numerous cases, and which is invoked herein, is that in a personal action the service of a summons in a county where suit is brought, on a nominal defendant merely, does not confer authority to issue summons to another county for a real defendant. *Dunn v. Haines*, 17 Neb., 560; *Cobbey v. Wright*, 23 Neb., 250; *Hanna v. Emerson, Talcott & Co.*, 45 Neb., 708. The rule stated might have been urged in the county court of Red Willow county before the judgment against Cummins was rendered, and if it had been shown that his co-defendant, Hayden, had no substantial interest in the subject of the suit, but was merely a nominal party to the proceeding, no judgment could have been obtained against Cummins.

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* * * If there was collusion or fraud between the execution and judgment plaintiff and Hayden, that was a matter which should have been made an issue in the county court of Red Willow county before the entry of the judgment. The question is not now available. * * * It is contended that the action brought against Cummins was barred by the statute of limitations. The defense of the statute was neither interposed by demurrer nor answer, and therefore is waived."

The case before us is ruled by the cases cited, as well as on principle by a long line of decisions of this state commencing with *Horn v. Queen*, 4 Neb., 108, which holds that to authorize a court of equity to grant relief against a judgment it must appear that the party seeking relief has not been negligent.

In *Scofield v. State National Bank*, 9 Neb., 316, it is held, a petition to enjoin a judgment must set forth facts from which it is made to appear, among other things, that the plaintiffs were not guilty of neglect in not making their defense.

In *Young v. Morgan & Gallagher*, 13 Neb., 48, it is stated: "The rule is well settled that equity will afford no relief against a judgment to a party who has purposely or negligently omitted to make his defense at law."

In *Shufeldt v. Gandy*, 34 Neb., 32, it is said: "Equity will not interfere to relieve a party who, being under no disability, has failed to make his defense at law on account of his own negligence."

In *Langley v. Ashe*, 38 Neb., 53, it is held: "A petition in equity to enjoin the enforcement of a judgment of a justice of the peace which does not aver facts from which it appears (1) that the plaintiff has a meritorious defense to the cause of action on which the judgment is based, and (2) that his failure to interpose such defense in the justice court, and to avail himself of an appeal or proceeding in error, was not due to any neglect or default on his part, does not state a cause of action."

In *Norwegian Plow Co. v. Bollman*, 47 Neb., 186, it is

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held: "A court of equity will not enjoin a judgment at law upon the ground of fraud where it does not appear that such judgment is inequitable, or where it is disclosed that plaintiff has not exercised due diligence in the assertion of his rights."

In *Cleland v. Hamilton Loan & Trust Co.*, 55 Neb., 13, it is said: "A party seeking relief in equity from a judgment taken against him by default must exhibit a defense to the action, and also show that the rendition of such judgment was not due to his failure to take such proper steps for his own protection as an adequate foresight of consequences would naturally suggest."

The rulings of this court in many other cases are to the same effect. The petition filed by the defendant in error neither states in terms, nor shows by its statement of fact, that he had no adequate remedy at law, but on the contrary affirmatively shows that he had such remedy and neglected to pursue it, and he is not entitled to relief against the judgment in question in a court of equity upon the facts pleaded. Whether the petition can be so amended as to state a good cause of action for any relief in equity we are unable to determine.

We therefore recommend that the judgment of the district court be reversed and the cause remanded to said court with directions to proceed therein in accordance with the foregoing opinion.

BARNES and ALBERT, CC., concur.

REVERSED WITH DIRECTIONS.

Curtiss v. McCune.

ADEL S. CURTISS, APPELLEE, v. WILLIAM E. McCUNE ET AL., APPELLEES, IMPEADED WITH G. W. STULL, APPELLANT.

FILED APRIL 30, 1903. No. 12,785.

Commissioner's opinion. Department No. 2.

1. **Sales: CONSENT OF SELLER AND BUYER: EVIDENCE.** The consent of both the vendor and the vendee is essential to a sale; but the consent of either may be inferred from all the facts and circumstances surrounding the transaction.
2. **Sales: COUPONS SOLD BY INDORSEE OF BOND: EVIDENCE: PAYMENT.** The facts and circumstances surrounding the transfer of certain coupons by the indorsee of the bond to which they were attached, examined, and *held* to show a sale and not a payment of such coupons.
3. **Assignments: COUPONS ASSIGNED TO THIRD PARTY: EFFECT ON MORTGAGE.** The detaching of interest coupons from a bond by the owner thereof and transferring them to a third party, operates as an assignment *pro tanto* of the mortgage which secures the entire debt. *New England Loan & Trust Co. v. Robinson*, 56 Neb., 50, 76 N. W. Rep., 415, followed and approved.

ERROR from the district court for Lincoln county.
Tried below before GRIMES, J. *Reversed with directions.*

Hoagland & Hoagland, for appellant.

The delivery of the coupon notes to Stull Brothers was an assignment *pro tanto* of the mortgage. *Studebaker Brothers' Manufacturing Co. v. McCargur*, 20 Neb., 500; *Todd v. Cremer*, 36 Neb., 430; *New England Loan & Trust Co. v. Robinson*, 56 Neb., 50; *Whitney v. Lowe*, 59 Neb., 87; *Wiltsie*, Mortgage Foreclosures, section 85, p. 97; *Burnett v. Hoffman*, 40 Neb., 569; *Griffith v. Salleng*, 54 Neb., 362.

Wilcox & Halligan and *Reavis & Reavis*, contra.

If Stull Brothers intended to purchase the coupons and not pay them, it was necessary that this intent should have been made known by their agent. *Union Trust Co. v. Monticello & P. J. R. Co.*, 63 N. Y., 311; *Cameron v.*

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Tome, 64 Md., 507, 2 Atl. Rep., 837; *United Water Works Co. v. Farmers' Loan & Trust Co.*, 27 C. C. A., 92, 82 Fed. Rep., 144; *South Corington & C. S. R. Co. v. Gest*, 34 Fed. Rep., 628; *United Water Works Co. v. Farmers' Loan & Trust Co.*, 53 Pac. Rep. [Colo.], 511; *Fidelity Ins. Trust & Safe Deposit Co. v. West Penn. & S. C. R. Co.*, 138 Pa. St., 494, 21 Atl. Rep., 21; *Haven v Grand Junction Railroad & Depot Co.*, 109 Mass., 88; *Farmers' Loan & Trust Co. v. Iowa Water Co.*, 78 Fed. Rep., 881.

OLDHAM, C.

This cause had its origin in a suit brought by Adel S. Curtiss to foreclose certain tax liens on a quarter section of land in Lincoln county, Nebraska. To this proceeding William E. McCune, as owner of the equity of redemption, and H. C. Spaulding and G. W. Stull, mortgagees, were made parties defendant. Spaulding filed an answer and cross-petition alleging that he had redeemed from the tax certificates disclosed in the petition of plaintiff, Curtiss, and that he was the owner of a principal bond with certain interest coupon notes thereon, secured by a mortgage, set forth in his petition, and asking for the foreclosure of the mortgage securing such bond and coupons. G. W. Stull, one of the defendants, filed a cross-petition alleging that he was the owner for value of three of the coupon notes formerly attached to the principal bond, owned by cross-petitioner Spaulding, and praying for a decree of foreclosure and that the amount due on his coupon notes be prorated with the amount due on the principal bond and coupon notes owned by cross-petitioner Spaulding. The other defendants named in the original action defaulted. On issues thus joined between cross-petitioners Spaulding and Stull, the trial court found a decree in favor of Spaulding for the amount of the tax lien purchased from plaintiff Curtiss, and the principal bond and coupons owned by Spaulding. The court also found the amount due cross-petitioner Stull on the coupons owned by him, and that they were a junior and in-

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ferior lien to the bond and coupons held by cross-petitioner Spaulding. From this decree cross-petitioner Stull appeals.

There is no conflict in the testimony in this record. But two witnesses testified, and each by deposition, so that in the consideration of the evidence the court below had no advantage over the reviewing court in determining questions of fact; consequently we are not bound by any findings and will review the cause anew in the light of the testimony contained in the depositions in the bill of exceptions.

It appears from the evidence that the bond and coupon notes in suit were executed by defendant McCune and wife to the firm of Stull Bros., at Lincoln, Nebraska, payable at the Maverick National Bank, of Boston, Massachusetts; that after receiving the bond and coupon notes attached thereto Stull Bros. indorsed the bond and coupons in blank without recourse, and forwarded the same to one Welles, a broker in Elmira, New York; that on receipt of the bond and coupons, Welles negotiated their sale to the agent and business manager of cross-petitioner Spaulding, and forwarded the proceeds of such sale to Stull Bros. at Lincoln; that when the first interest coupon matured Stull Bros. forwarded the amount of the same to Welles, who paid the coupon with his individual check to the agent of Spaulding at Elmira, and forwarded it to Stull Bros. The same course was pursued when the second coupon matured. Each of these coupons were redeemed from Stull Bros. and canceled by McCune the mortgagor.

When the 3d, 4th and 5th coupons (the ones in suit) matured, Stull Bros. each time forwarded the amount of the several coupons to Welles with directions to purchase the same and have them detached and returned to Stull Bros. This Welles did, each time taking up a coupon at or about the time of its maturity with his individual check at Spaulding's banking house in Elmira. These three latter coupons were never redeemed by McCune, but were indorsed by Stull Bros. to cross-petitioner G. W. Stull.

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There is no evidence in the record showing that McCune directed any one to take the coupons up for him, or that there was any understanding or agreement between him and Stull Bros. that they should redeem them as his agents. The coupons were received from Welles in the same condition that they were in when sold to cross-petitioner Spaulding. The blank indorsements never having been filled in until after their return to Stull Bros., Charles E. Rapelyea, the business manager of Spaulding, negotiated the purchase of the bond and testifies that Welles made no representation to him as to whom he was purchasing the coupons for, but that he supposed that the coupons were being paid by the mortgagor through the agency of Welles. Welles did not testify. The testimony was confined to the depositions of G. W. Stull and Charles E. Rapelyea, Spaulding's business manager. Cross-petitioner Stull says that Stull Bros. never intended to pay any of the coupons; that they did not know who owned the principal bond and coupons, but remitted to Welles with directions to have the coupons reassigned and returned to them, in conformity with their established custom of doing business. This is all the material testimony contained in the bill of exceptions, and from this we must determine whether or not the transaction shows a purchase of the coupons in controversy by Stull Bros. through Welles, or whether it justified the supposition of Spaulding's business manager that as between Spaulding, Welles and Stull Bros. the coupons were delivered for payment and cancellation.

The first circumstance bearing on a solution of this question is the fact that Stull Bros. procured these coupons with their own means without any agreement between them and the mortgagor. The next circumstance is that there was no obligation on Stull Bros. to make these payments as they had indorsed the bond and coupons without recourse; and no claim is made that when Welles sold the bond he agreed, or even suggested, that Stull Bros. would collect the interest for the indorsee of the

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bond. Another thing worthy of note is the fact that the coupons were never presented by the indorsee at the Maverick National Bank for payment. If this had been done by the holder of the bond and coupons he would have been justified in the supposition that they were taken up for redemption and cancellation even though he had neglected to stamp them as paid. But this was not done; on the contrary, at or about the time each coupon fell due, Welles called at the place of business of the holder of the bond and asked for the coupon, paid the amount due thereon, and the holder detached it from the bond and delivered it to Welles without cancelling it or directing that the coupon should be canceled or even asking Welles whether he was intending to pay or purchase the coupon; under this arrangement the holder of the bond must have known that in all probability Welles would circulate the coupons instead of cancelling them. And again, it is clear that Stull Bros. intended to purchase and not to pay the coupons. While it is undoubtedly true, as contended by counsel for appellee, that there can be no sale without the consent of both the vendor and the vendee, yet it is equally true that the consent of either may be inferred from all the facts and circumstances surrounding the transaction.

A transaction attended with facts and circumstances very similar to those surrounding the case at bar was before the supreme court of the United States in *Ketchum v. Duncan*, 96 U. S., 659, and in determining whether the holder of the coupons was entitled as a purchaser thereof to prorate on the sale of the security with the holder of the bond, Strong, J., in delivering the opinion of the court said: "Interest-coupons are instruments of a peculiar character. The title to them passes from hand to hand by mere delivery. A transfer of possession is presumptively a transfer of title. And especially is this true when the transfer is made to one who is not a debtor, to one who is under no obligation to receive them or to pay them. A holder is not warranted to believe that such a person

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intended to extinguish the coupons when he hands over the sum called for by them and takes them into his possession. It is not in accordance with common experience for one man to pay the debt of another, without receiving any benefit from his act. We cannot close our eyes to things that are of daily occurrence. It is within common knowledge that interest-coupons, alike those that are not due and those that are due, are passed from hand to hand; the receiver paying the amount they call for, without any intention on his part to extinguish them, and without any belief in the other party that they are extinguished by the transaction. In such a case, the holder intends to transfer his title, not to extinguish the debt. In multitudes of cases, coupons are transferred by persons who are not the owners of the bonds from which they have been detached. To hold that in all these cases the coupons are paid and extinguished, and not transferred or assigned, unless there was something more to show an assent of the person parting with the possession that they should remain alive, and be available in the hands of the person to whom they were delivered, would, we think, be inconsistent with the common understanding of business men."

A number of cases are cited by counsel for appellee to support their contention that the facts and circumstances surrounding the instant transaction show as between these cross-petitioners a payment and not a purchase of the coupons in controversy. We have examined the cases cited, but find that the underlying facts easily distinguish each of them from the case at bar; one of the leading cases relied on is that of the *Farmers' Loan & Trust Co. v. Iowa Water Co.*, 78 Fed. Rep., 881; but in this case the holders of the bond presented their coupons at the place of payment and they were paid by an agent of the debtor, and it was properly held that under such circumstances as between the holder of the bonds and the holder of the coupons, who was the agent of the debtor, the transaction showed a payment and not a purchase of the

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coupons. In other cases cited, the evidence showed an agreement between the debtor and a third person making the payment that such person should pay the coupons when due and hold them as evidence of the money advanced by such third person for the debtor. So that none of these cases are determined on facts similar to those surrounding the case at bar. We therefore conclude that the evidence in this case shows a purchase and not a payment of the coupons by Stull Bros. If we are correct in this conclusion it would then follow that the coupons purchased by cross-petitioner Stull should have been prorated with the bond and coupons held by cross-petitioner Spaulding; for it was said by this court in *New England Loan & Trust Co. v. Robinson*, 56 Neb., 50, 76 N. W. Rep., 415, that "The detaching of an interest coupon from a bond, by the owner thereof, and transferring it to a third party, operate as an assignment *pro tanto* of the mortgage which secures the entire debt."

It is therefore recommended that the judgment of the district court be reversed and the cause remanded with directions to the trial court to award cross-petitioner Spaulding a first lien on the mortgaged premises for the tax certificates purchased from plaintiff Curtiss, and that the amount due on his bond and coupons be prorated with the amount due on the coupons of cross-petitioner Stull, on the residue of the mortgage security.

BARNES and POUND, CC., concur.

The judgment of the district court is reversed and the cause remanded with directions to the trial court to award cross-petitioner Spaulding a first lien on the mortgaged premises for the tax certificates purchased from the plaintiff Curtiss, and that the amount due on his bond and coupons be prorated with the amount due on the coupons of cross-petitioner Stull, on the residue of the mortgage security.

REVERSED WITH DIRECTIONS.

Povier v. McCarthy.

A. P. BOVIER V. MICHAEL MCCARTHY.

FILED APRIL 30, 1903. No. 12,786.

Commissioner's opinion. Department No. 3.

1. **Usury: NOTICE: BONA FIDE PURCHASER: PLEADING: EVIDENCE: BILLS AND NOTES.** To avoid a defense of usury, an indorsee of a negotiable note must plead and prove that he took without notice of the usury as well as that he purchased before maturity and for a valuable consideration.
2. **Pleading: BONA FIDES: NOTICE: INSTRUCTIONS: PREJUDICE: BILLS AND NOTES.** Where no issue as to the *bona fides* of the transfer and want of notice on the part of the indorsee is raised by the pleadings, error in instructing the jury that a promissory note, containing an agreement to pay exchange on the principal sum, is non-negotiable, is without prejudice.

ERROR from the district court for Holt county. Tried below before HARRINGTON, J. *Affirmed.*

R. R. Dickson, for plaintiff in error.

M. F. Harrington, contra.

POUND, C.

This is an action upon a promissory note by an indorsee. The defendant pleads usury. The trial court instructed the jury that the note was non-negotiable and submitted the question of usury only, refusing an instruction, tendered by the plaintiff, in which the effect of purchase in good faith, for value, before maturity, was explained, and the question whether the plaintiff so purchased was submitted. We think the position taken was erroneous, since the sole defect seems to have been that the note contained an agreement to pay exchange on the principal sum. *Haslach v. Wolf*, 66 Neb., 600, 92 N. W. Rep., 574. But it seems clear that the error was without prejudice. To avoid a defense of usury, an indorsee of a negotiable note must plead and prove that he took without notice of the usury as well as that he purchased before

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maturity and for a valuable consideration. *Wortendyke v. Meehan*, 9 Neb., 221; *Olmsted v. The New England Mortgage Security Co.*, 11 Neb., 487; *McDonald v. Aufden-garten*, 41 Neb., 40. No such allegation is to be found anywhere in the plaintiff's pleadings. So long as no issue as to the *bona fides* of the transfer and want of notice on the part of the indorsee is raised by the pleadings, the error in instructing the jury that the note was non-negotiable was without prejudice.

We therefore recommend that the judgment be affirmed.

DUFFIE and KIRKPATRICK, CC.; concur.

AFFIRMED.

IRWIN H. EMERY V. DAVID HANNA ET AL.

FILED APRIL 30, 1903. No. 12,805.

Commissioner's opinion. Department No. 3.

1. Trial: PLEADING: AFTER DEMURRER: WAIVER OF ERROR. An assignment of error in overruling a demurrer to an answer is not available where the plaintiff afterwards replied to the answer.
2. Appeal and Error: EXCEPTIONS. BILL OF: CONTENTS: EVIDENCE. Unless there is a bill of exceptions containing all the evidence, this court will not review the findings of fact in the lower court.
3. Mortgages: FORECLOSURE: AGREEMENT TO PROTECT LIEN-HOLDER: SHERIFF'S RETURN. Evidence tending to show an arrangement whereby property purchased at foreclosure sale by a prior lien-holder was to be held for the benefit of a subsequent lien-holder and that the latter afterwards became the beneficial owner thereof by a conveyance pursuant to such arrangement, does not contradict or vary the sheriff's return setting forth the sale and the sum realized therefrom.

ERROR from the district court for Cherry county.
Tried below before WESTOVER, J. *Affirmed.*

John M. Tucker, for plaintiff in error.

A. M. Morrissey, contra.

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POUND, C.

The plaintiff was the holder of a third lien under a decree of foreclosure. Sale was had pursuant to the decree and the sheriff's return showed a small surplus over and above the first and second liens for application upon the plaintiff's claim. The plaintiff alleges that relying upon the sheriff's return he purchased the second lien, and he seeks to recover the amount shown by the return as available for satisfaction of such second lien and for application upon his third lien. The answer is, in substance, that the property was purchased by the holder of the first lien in trust for the plaintiff under an agreement whereby the former was to hold it until the plaintiff paid him the amount of the first lien and was then to turn it over, and that afterwards, in pursuance of such arrangement, the property was conveyed to a third person at the instance and request of plaintiff and is now held in trust for him by such third person; the plaintiff himself being in possession and being the real and beneficial owner. It is further alleged that no money was ever paid, but that the plaintiff by said arrangement obtained credit upon his lien for the amount of the surplus. A demurrer was filed to this answer and overruled, whereupon the plaintiff replied. There was a verdict and judgment for the defendant.

The errors assigned are that the court erred in overruling the demurrer, that the findings are contrary to the evidence, and that the court erred in admitting parol evidence to contradict or vary the sheriff's return.

The assignment that the court erred in overruling the demurrer to the answer can not be sustained for the reason that error in that respect, if any, was waived by replying. *Harral v. Gray*, 10 Neb., at page 188; *Dorrington v. Minnick*, 15 Neb., at page 400. There is no assignment that the judgment is contrary to law or not sustained by the pleadings, and the sufficiency of the answer is not in any way presented. No bill of exceptions was settled, but in-

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stead, there is a mere stipulation purporting to set forth "the substance" of the evidence. It is well settled that the findings of fact in the trial court will not be reviewed in the absence of a bill of exceptions containing all the evidence. *Faulkner v. Meyers*, 6 Neb., 414; *Aspinwall v. Sabin*, 22 Neb., 73. If a material portion of the evidence has been omitted, a verdict or finding of fact will not be reviewed. *Anderson v. Beeman*, 52 Neb., 387. This is true even where the bill of exceptions purports to contain all the evidence, if there is a palpable omission. *Scott v. Society of Russian Israelites*, 59 Neb., 571. In view of these authorities, we can not be expected to review the findings of fact upon a stipulation which goes no further than to state the substance of the evidence in the most meager fashion.

The stipulation sets forth that evidence was introduced in support of the allegations in the answer and was objected to as incompetent on the ground that the sheriff's return could not be varied or contradicted by parol. We do not see any reason to think that the parol evidence rule is involved in this case. The defendant did not seek to impeach or vary his return by the answer. He admitted that there had been a sale as returned and that the amount set forth in the return had been realized at such sale. Admitting this, he pleaded and sought to show an arrangement between the plaintiff and the prior lien-holder whereby, in effect, the plaintiff received credit upon his lien for the proceeds in excess of the prior liens. So far as the answer discloses, the defendant's case was that plaintiff had been paid, not that the amount returned had not been realized at the sale.

We therefore recommend that the judgment be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

AFFIRMED.

Anderson v. Hall.

PETER ANDERSON ET AL. V. NELS P. HALL.

FILED APRIL 30, 1903. No. 12,810.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: PLEADINGS JOINT: PREJUDICE: NEW TRIAL. MOTION FOR.** "Where two defendants join in a motion for a new trial, and also file a joint petition in error in this court, the judgment will be affirmed unless the record discloses error prejudicial to both." *Brong v. Spence*, 56 Neb., 638, 77 N. W. Rep., 54, followed and approved.
2. **Bills and Notes: GUARANTY: LIABILITY OF GUARANTOR.** The liability of a guarantor is separate and distinct from that of the makers and sureties on a promissory note.
3. **Mortgages: FORECLOSURE: GUARANTY: EVIDENCE SUFFICIENT.** Evidence examined, and *held* sufficient to support the judgment of the trial court.

ERROR from the district court for Saunders county.
Tried below before SORNBORGER, J. *Affirmed.*

V. L. Hawthorne and John H. Barry, for plaintiffs in error.

E. E. Good and G. W. Simpson, contra.

OLDHAM, C.

This was an action instituted by Nels P. Hall to foreclose a real estate mortgage, executed by Peter Anderson and Rosa Anderson his wife. There was a decree of foreclosure in the court below, from which defendants bring error to this court. A joint motion for a new trial was filed in the court below by these defendants and they both join in the petition in error filed in this court.

The facts involved in this controversy are substantially as follows: For many years prior to 1894, plaintiff Hall had been a resident of Saunders county, and defendant Peter Anderson had been his agent loaning his money and having custody of his securities. Sometime before 1894, Hall returned to his native land in Sweden.

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After Hall's return to Sweden, Anderson continued as his agent in loaning money and collecting interest and principal due on the loans. Sometime during the existence of this agency, Anderson loaned himself \$1,200 of Hall's money, and executed a note from himself and wife to Hall, secured by mortgage on Anderson's homestead in Wahoo. The note and mortgage were each dated January 13, 1894, but were not acknowledged by Anderson and wife until November 14, 1896. In the fall of 1896, Hall returned to Saunders county and remained there until March, 1897, when he again went to Sweden. When Hall checked up his account with Anderson, he received from him all notes and securities in his hands, except the mortgage in controversy, and arranged to have his business conducted by another agent in Saunders county after his return to Sweden.

Anderson presented the note and mortgage to Hall in payment of his obligation. It appears that Hall objected to the sufficiency of the surety on the note, and that Anderson agreed to get a guarantor on the note, which he accordingly did. He then returned the note, with a contract of guaranty by N. B. Berggren on the same, to Hall, who accepted it and directed Anderson to have the mortgage recorded and delivered to his new agent at Mead, Nebraska. Anderson accordingly filed the mortgage for record and after it was recorded delivered it by mail to Hall's agent at Mead. Subsequently the note and mortgage were delivered by Hall's agent to his attorneys and this cause of action was instituted for the foreclosure of the mortgage.

At the trial of the cause one of Hall's attorneys testified that after the note and mortgage came into his possession he had a conversation with Anderson in which Anderson said that no action at law had ever been instituted on the note. This conversation was not denied and was all the proof offered to make a *prima facie* showing that no action at law had been instituted. The question as to the want of proof of no action at law is relied

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upon by counsel for plaintiff in error as a sufficient ground for a reversal of the judgment. It seems to us that this was a sufficient *prima facie* showing; certainly it was so as against Peter Anderson, and if it was the wife is foreclosed from complaining that the showing was not sufficient as to her by joining with her husband in the motion for a new trial and the petition in error.

In *Brong v. Spence*, 56 Neb., 638, 77 N. W. Rep., 54, the rule is laid down that "Where two defendants join in a motion for a new trial, and also file a joint petition in error in this court, the judgment will be affirmed unless the record discloses error prejudicial to both."

The next question urged is that Rosa Anderson was released from both the note and mortgage by the action of Peter Anderson and plaintiff Hall, in having a contract of guaranty added to the note without her knowledge or consent. In the first place there is nothing in this contention as a legal proposition, because the contract of guaranty is a separate and independent liability distinct from any existing in favor of the holder of the note against the maker and surety thereon, and the guarantor can not be sued jointly with the maker and surety on the note. *Mowery v. Mast & Co.*, 9 Neb., 445; *Barry v. Wachosky*, 57 Neb., 534, 77 N. W. Rep., 1080. And again, Mrs. Anderson is in no position to urge this defense in her own favor, even if it existed, on account of having joined with her husband in the motion for a new trial and petition in error.

The only other question urged in the brief of plaintiff in error is that the evidence fails to show that there was a delivery of the mortgage to Hall after its execution and recording. We have examined the record and find it to be as before set out in this opinion; consequently as a matter of fact there is nothing in this contention.

It is therefore recommended that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

Waller v. Deranlean.

GEORGE P. WALLER ET AL. V. LUCIEN DERANLEAU.

FILED APRIL 30, 1903. No. 12,830.

Commissioner's opinion. Department No. 1.

1. Attachment: ACTION ON BOND: PLEADING DAMAGES AND PAYMENT: DIRECTING VERDICT. The fact that plaintiff in a suit on an attachment undertaking did not in terms allege that the damages for which he sued were unpaid, where defendants answered denying the damages and the cause of action, and setting up offsets, and allege no payment, and where the evidence shows throughout that damages have always been denied and are unpaid, does not entitle the defendant to an instruction for a verdict or to a judgment upon the pleadings.
2. Attachment: WRONGFUL: EVIDENCE SUFFICIENT. Evidence held sufficient to sustain a finding that the attachment was wrongfully issued.
3. Attachment: ACTION ON BOND: PAYMENT: PLEADING: EVIDENCE. Payment is a defense which must be alleged and proved in an action on an attachment undertaking.
4. Attachment: ACTION ON BOND: EVIDENCE: ADMISSIBILITY OF UNDERTAKING. An attachment undertaking in the body of which defendants' names appear as obligors is admissible in evidence although at the bottom appears the name of a banking company of which they were respectively president and cashier, with a pen-mark erasure through it and the appearance that "by" had originally been written before each of their names, and "Pres." after one and "cashier" after the other.
5. Attachment: ACTION ON BOND: ALTERATIONS: FINDINGS: EVIDENCE SUFFICIENT. Evidence held to sustain the finding that the alterations were made by the purported signers before delivery.
6. Attachment: ACTION ON BOND: PARTIES: DESCRIPTION: EVIDENCE. Where it is alleged and sufficiently appears that the plaintiff in the suit on the attachment undertaking, who is there named as "Lucien," is the real defendant and the one whose property was seized under the attachment, it is not sufficient ground for rejecting the evidence of the record in the attachment case that defendant is therein designated as "Lewis," the evidence in the present case showing that he is known as "Lucien," "Lewis," and "Lew."
7. Set-off and Counter-claim: PLEADING. An item of offset not pleaded cannot be recovered for.
8. Attachment: ACTION ON BOND: INSTRUCTIONS APPROVED. Certain instructions examined and held not open to the objections raised against them.

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9. **Attachment: ACTION ON BOND: PRINCIPAL AND SURETY: SET-OFF AND COUNTER-CLAIM.** Sureties on an attachment undertaking allowed the benefit of legal offsets held by their principal, who was not a party to the action against plaintiff, the principal assenting to such defense and assisting in presenting it.

ERROR from the district court for Dawes county. Tried below before WESTOVER, J. *Affirmed.*

Allen G. Fisher, for plaintiffs in error.

Albert W. Crites and W. H. Fanning, contra.

HASTINGS, C.

William E. Alexander and George P. Waller, as plaintiffs in error, severally present their petition alleging error in a judgment of the district court for Dawes county in eleven particulars, in the fourth of which there are twenty-one items, in the seventh of which there are twenty-four items, in the eighth of which there are twenty-five items, and in the ninth nine items and in the eleventh twenty-four items. The case is here for the second time, having been passed upon under the title of *Jandt v. Deranleau*, 57 Neb., 497, and is itself an outgrowth of the case whose final judgment was affirmed in *Deranlieu v. Jandt*, 37 Neb., 532. At the former hearing the court expressed the opinion that the record was a revelation as to the number of objections and exceptions which by industry could be crowded into a moderate sized record. The present one is like unto it.

It is not necessary, however, to examine all of the points raised in the petition in error. Only a comparatively few of them are discussed in the brief. The first one argued is that the petition does not state facts sufficient to constitute a cause of action. Counsel for the plaintiffs in error says that this point was raised at the beginning of the trial. Counsel for the defendant says it was not mentioned until the plaintiff had rested his case, and then in a motion for a verdict, and was then not argued nor discussed plainly enough so that the particular defect was

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pointed out and neither counsel nor the court learned of it until the argument on the motion for a new trial.

No such objection appears at the beginning of the trial. We do not find any objection to the sufficiency of the petition until plaintiff rested, when, among the grounds for asking a direction of the verdict in defendants' favor, it is said that the petition does not allege any breach of the condition of the attachment undertaking which is the foundation of the action, does not allege any demand or failure to pay damages nor that the attachment was wrongfully issued nor without probable cause; alleges no failure to return the property; no demand by plaintiff for it, and does allege a conversion by the original plaintiff, Jandt. The motion for new trial also states as its first ground that no cause of action is alleged in the petition. A motion was made subsequent to the verdict for a judgment in their favor by each of the defendants on the ground that the pleadings showed no cause of action against them, and the overruling of these motions is alleged for error.

The first complaint against the petition is that it does not show a wrongful issuance of the attachment. The petition does allege, paragraph three, that "Jandt wrongfully sued out in said action his certain order of attachment against said plaintiff" and caused it to be levied on the latter's property, which is described. We think, in the absence of any motion to make more specific, and after verdict, that this is a sufficient allegation of a wrongful attachment.

It is next complained that the petition does not show that the original action was one in which a writ of attachment might issue, nor that the evidence in it disclosed any ground for the attachment, nor that the undertaking was filed before the issuance of the writ. None of these objections strike us as fatal, for it is alleged that the undertaking in question, which is set out in *hæc verba*, was executed and delivered for the purpose of procuring the attachment.

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It is also complained because the undertaking runs to "Lewis" Deranleau instead of "Lucien." It, however, is sufficiently and clearly alleged that the undertaking was given to procure an attachment against the plaintiff and that the writ was levied upon his property. It seems to have been done under a mistake as to his given name which was never rectified in that action. The undertaking in fact described the action as against "Lewis" Deranleau and runs to "said defendant." His identity is clearly established.

It is next complained that it nowhere alleged that damages have not been paid, and the condition of the undertaking is simply "that the plaintiff shall pay the said defendant all damages * * * which he may sustain by reason of the attachment in this action if the order therefor be wrongfully obtained." This condition is in accordance with the statute and it is true that there is no allegation in express terms that these damages have not been paid. There is an allegation that the attachment was dissolved and the property released; an allegation that the property was not returned as it was ordered to be done, but was sold and converted by Jandt to his own use; an allegation of the value of the property; an allegation of damages by reason of costs, attorney fees, loss of property, trouble and annoyance to the total amount of \$1,012, the penalty in the undertaking, but there is no allegation of non-payment of these damages, and, therefore, defendants claim, no allegation of any breach of the condition of the undertaking.

Plaintiff's counsel concede that this is the condition of the pleading, but urge that the pleading as a whole sufficiently indicates the non-payment; that it is still more strongly indicated by the answers which must be taken to supplement the petition; that payment is a matter of defense which must be pleaded; that after the defect was called to counsel's attention in the motion for a new trial, application was made for leave to amend in accordance with the evidence, which was refused, and such refusal

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was an abuse of discretion by the trial court for which plaintiff should not be compelled to suffer.

Barr v. Ward, 36 Neb., 905, is cited by both parties. It does not seem, however, to have any direct bearing upon the particular question here, namely, the necessity to allege that these damages are unpaid in order to establish a breach of the condition of the bond. The answers, however, allege a recovery of judgment by Jandt in the original action, and also allege another judgment obtained by him against the plaintiff for supreme court costs arising out of the litigation, both of which are asked to be offset against the claim for damages, and we think the pleadings, taken as a whole, sufficiently indicate that these damages are unpaid, and we also think that in this case, as in others, payment is a defense and should be pleaded if it is claimed.

The obligation of the bond is for the payment of damages. The liability upon it occurs when the damages accrue, and the liability upon the bond is shown when the damages are proven, and we think the burden of pleading and establishing any discharge of that liability rests upon the defendants. The Nebraska cases, *Clark v. Mullen*, 16 Neb., 481; *Culbertson Irrigating & Water-Power Co. v. Cox*, 52 Neb., 684; *Ashland Land & Live-Stock Co. v. May*, 51 Neb., 474; *Van Buskirk v. Chandler*, 18 Neb., 584; *Cady v. South Omaha National Bank*, 46 Neb., 756, in which it is held that the defense of payment must be pleaded, and, if denied, proved, are, it is true, all upon promissory notes or simple contract debts; but it is hard to see why the same rule should not be applied to the liability upon the bond in this case, especially in view of the fact that offsets are pleaded. If necessary an amendment in accordance with the evidence should have been allowed.

It is also complained that no demand for the property is alleged. It is also alleged in the petition that the defendant Jandt had refused to return the property and had converted it to his own use. Probably this was un-

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necessary, the real obligation of the bond being to pay damages and an obligation resting against the defendants when it is shown that damages have been sustained by reason of the attachment writ being wrongful. We think no demand was needed.

It is complained that there is no allegation that attorney fees, which are asked as an element of damages, have been paid. No authorities are cited for this proposition and it seems to be against the holding in *Raymond Bros. v. Green & Co.*, 12 Neb., at page 220, and other holdings of this court to the effect that a subsisting liability for reasonable attorney fees will support a claim for their recovery even if they have not been paid, where such liability was caused by defendant's wrongful act.

It is thought that there was no error on the part of the trial court in refusing to hold that no cause of action appears in these pleadings.

The claim that there is no *prima facie* case made upon the evidence must also be considered. The claim rests on the proposition that the order of attachment was assailed for irregularities as well as upon its merits, and the dissolution of the attachment upon that ground is therefore not conclusive as to whether or not it was wrongfully issued, and that the proof taken in this action is not sufficient to show that it was wrongfully issued.

Pages 8 to 17, inclusive, of defendant's brief are occupied with a statement and analysis of the evidence. The plaintiff does not take the trouble, so far as we can discover, to mention this contention in his brief. An inspection of the testimony shows that Deranleau denies in emphatic terms the disposition of any property or the removal of any property with intention to defraud his creditors; that Mrs. Deranleau filed her affidavit denying the grounds of attachment and setting up her own personal knowledge of the business as clerk and bookkeeper for her husband. We find absolutely nothing in the record in the way of support for the attachment except the fact that Deranleau, with the full knowledge of Jandt, and

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without objection, took his tools and teams, first to Buffalo Gap, then to Randolph, Nebraska, and then to Hershey, Wisconsin, to engage in railroad work at those places. So far as the record shows no attempt was made to support the affidavit in attachment after its allegations were denied by Mrs. Deranleau.

The burden of proof was on the attaching plaintiff Jandt, to support his alleged grounds of attachment when they were denied, but, so far as it appears, he did not do so. It is true that the attachment was sustained in the county court but it was dissolved on proceedings in error by the district court. It is true that it was attacked for irregularities in several particulars, as well as on the ground that the affidavit was untrue. The latter ground, however, was in itself ample to dissolve the attachment after its grounds were denied and unsupported. The evidence seems ample to uphold a verdict that the attachment was wrongfully issued because its grounds were untrue.

The next complaint is as to erasures in the undertaking. It purports to be executed by the defendants Waller and Alexander. Above their names is "Crawford Banking Company." Through this a line has been drawn with a pen and following are defendants' names. Apparently "by" was written before each of these names and "Pres." after one and "Cashier" after the other, but these words have been erased. The undertaking stands with the names of George P. Waller and W. E. Alexander written in the body as sureties and signed by them. It is claimed that in this condition the paper was inadmissible in evidence, and *Oliver & Co. v. Hawley*, 5 Neb., 439; *Hagler v. State*, 31 Neb., at page 148; *Kime v. Jesse*, 52 Neb., 606, and *Schlageck v. Widhalm*, 59 Neb., 541, are cited in support of this position. The first case was reversed because the court instructed the jury to find for defendant if they found a certain alteration to be material. Materiality is a question of law for the court. The second one is simply a holding that a material alteration after signature and

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before delivery avoids a bond as to each signer who does not ratify the change. *Kime v. Jesse* was a holding that the alteration in a mortgage alleged was a material one and would avoid it, and as this appeared from the petition, the judgment upon the pleadings that it was void was affirmed. *Schlageck v. Widhalm* affirmed a judgment rendered upon special findings to the effect that, after the execution of the bond which was the foundation of the action, its penalty was altered and without the assent of the obligor and obligee. This was held not to avoid the bond, but judgment for defendants was affirmed because it also appeared that they had sued on the bond in its altered form and the undisputed evidence showed that the alteration was made before its approval by the justice and with notice to him. We find nothing in these cases to indicate that the undertaking here sued upon should not have been submitted to the jury, and the evidence taken in reference to the time and authority of the alterations.

The decisions in this state have varied very much as to the presumption and burden of proof in cases of alterations of instruments, but we are not informed that there has been any change since the holding of *Dorsey v. Conrad*, 49 Neb., 443, that an instrument materially and obviously altered may go in evidence in the first instance, leaving the parties to such explanation as they may choose to offer, overruling *Johnson v. First National Bank*, 28 Neb., 792, and *Courcamp v. Weber*, 39 Neb., at page 538. *Dorsey v. Conrad* seems to be approved in *McClintock v. State Bank of Table Rock*, 52 Neb., 130.

We think there was no error in admitting the undertaking. It is true that one of the signers testified that when he signed this undertaking there was no line drawn through the name "Crawford Banking Company," and that he never authorized the change, but his statement of the circumstances of the execution of the paper is opposed in many particulars to the evidence given at the trial. The fact that the undertaking purports to be that of the

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two individuals, and not of the banking company, and the fact that it was given under leave of county court to amend the undertaking after one executed by the Crawford Banking Company had been objected to, seem sufficient to sustain the verdict of the jury so far as the execution of this undertaking is concerned.

It is claimed that the undertaking was not given for a sufficient consideration. The record of the county judge shows that leave was given to file an amended one. It shows that the one executed first was solely by the Crawford Banking Company and, therefore, presumably *ultra vires*. It shows an objection on that ground and leave to amend. This additional bond is an amendment given to sustain the attachment and would have a sufficient consideration in the retaining of the property for whose holding it was given.

It is further complained that there was error in admitting any of the county court records for the reason that the defendant in that case is named as "Lewis" Deranlean, and this action is brought by "Lucien," but the evidence abundantly shows, as the petition alleges, that the present plaintiff was the defendant in the attachment; that it was his property which was taken and he testifies that he is known as "Lewis," "Lucien" and "Lew" Deranlean. The undertaking runs to the said defendant and, as before stated, we think there is no doubt of his identity with the present plaintiff.

Complaint is made of the refusal to permit the defendants to prove a recovery of judgment for costs in the sum of \$106 on the former reversal of the present case. It is impossible to see how this can be prejudicial, as the settlement of such costs would be an inevitable incident of the settlement of the judgment in plaintiff's favor if it is affirmed, but we do not find any such item pleaded in the answer.

Complaint is made of instruction one because it assumes that Lucien Deranlean was defendant in the attachment suit. As above suggested, we think the evidence

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is such as to entirely warrant the court in making such an assumption. The complaint made to instruction four on the same ground is not of any better merit.

Complaint is made as to instruction numbered two because it tells the jury that the defendants in their answer say that they "executed" the undertaking as president and cashier of the Crawford Banking Company, as the act of said corporation and for no other purpose. The point is urged that in their answer they admit "the signing but in a different shape and condition." An examination of the answer shows that the trial court was literally correct and the admission is that they "executed" as is stated in the instruction.

Complaint is made of instruction numbered five because it does not "require to be proved, as directed in the former decision of this court, that the attachment was dissolved because the court found that it was issued because the grounds were untrue and did not exist." The trial court, however, did instruct the jury that they must find that the attachment was wrongfully issued and that the grounds stated in the affidavit for it did not exist and were untrue, and in this, we think, did follow the ruling of this court.

As stated at the beginning, the plaintiff also has filed a petition in error asking that Jandt's judgment against Deranleau with costs, which were allowed as an offset to plaintiff's claim, be stricken out and judgment entered for the full amount of damages found. The only reason assigned for such action is that the judgment was in favor of Jandt and that he is not a party to this proceeding. We think, however, that the plaintiff can not recover from the sureties any more than what is due him from the principal, and if these judgments are a legal offset to his claim against Jandt they operate to reduce by so much his right of recovery against these sureties; that is to say, his damages by reason of this attachment are to be reduced by the amount of his legally ascertained indebtedness on the original action to the principal. *Van Etten*

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v. Kusters, 48 Neb., at page 154; *Raymond Bros. v. Green & Co.*, 12 Neb., 215.

It is recommended that the judgment of the district court be affirmed.

KIRKPATRICK, C., concurs.

AFFIRMED.

RUMSEY SALING V. THE ESTATE OF CATHERINE SALING,
DECEASED.

FILED APRIL 30, 1903. No. 12,841.

Commissioner's opinion. Department No. 1.

Appeal and Error: NEW TRIAL, MOTION FOR: FAILURE TO FILE. Where no motion for a new trial is filed in the court below, the action of the trial judge in admitting and excluding evidence will not be reviewed by this court.

ERROR from the district court for Sarpy county.
Tried below before READ, J. *Affirmed.*

A. E. Langdon and Geo. A. Magney, for plaintiff in error.

James Hassett, contra.

OLDHAM, C.

This case was originally begun on the probate side of the county court of Sarpy county to require the administrator of the estate of Catherine Saling, deceased, to render an accounting and show cause why he should not pay the claim of plaintiff in error against said estate. Issues were joined on the citation in the probate court, and judgment was rendered in favor of the administrator. The plaintiff in error appealed from the judgment of the probate court to the district court, where issues were again joined, and a judgment rendered affirming the judgment of the probate court. From this judgment the plaintiff brings error to this court.

Cutter v. Woodard.

At the trial of the cause in the district court all evidence offered by plaintiff was excluded by the trial judge. No motion for a new trial was filed in the district court, and the questions we are now requested to examine are with reference to the rulings of the district court in excluding the testimony offered by plaintiff. These questions, however, we cannot examine because no motion for a new trial was filed in the court below, and as the answer of the administrator stated a good defense to the citation, we recommend that the judgment of the district court be affirmed.

HASTINGS and AMES, CC., concur.

AFFIRMED.

BLOODGOOD H. CUTTER, APPELLEE, V. NELLIE WOODARD, APPELLANT.

FILED APRIL 30, 1903. No. 13,061.

Commissioner's opinion. Department No. 3.

Mortgages: FORECLOSURE: SECOND SALE: COSTS: INTEREST: DEFICIENCY. A sale of mortgaged premises was made under a decree of foreclosure in January, 1900, the plaintiff in the action being the successful bidder. No confirmation of this sale appears to have been had and no deed issued thereon. A second sale was advertised and made in March, 1902, the plaintiff again bidding in the property. Objection to confirmation was made by the defendant who, among other matters, urged the first sale and the defendant's right to a credit for the amount bid thereat. The court confirmed the sale and ordered a deed charging the plaintiff with the costs of the second sale and allowing interest on the full amount of the decree up to the date of the first sale only, and a judgment for the deficiency. *Held*, No error.

APPEAL from the district court for Dawes county.
Tried below before HARRINGTON, J. *Affirmed*.

Allen G. Fisher, for appellant.*Albert W. Crites*, contra.

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DUFFIE, C.

A decree foreclosing a mortgage was entered in this case July 19, 1898. An order of sale issued on said decree and a sale of the property was made on January 11, 1900. The plaintiff was the purchaser at said sale, his bid being \$1,000, which was more than two-thirds of the appraised value. For some reason not appearing from the record the premises were again advertised and sold to the plaintiff on March 17, 1902, his bid being \$1,001. The defendant filed objections to a confirmation of the sale, urging among other matters "that the property was sold at sheriff's sale duly advertised and held on January 11, 1900, and the plaintiff herein at that time was the purchaser and defendant is entitled to credit for the purchase price thereof. All of which will appear by the supplementary bill of exceptions filed June 5, 1899, and the return to the order of sale filed June 11, 1900."

The court made an order confirming the sale but only allowed the plaintiff interest on the amount of his decree up to the date of the first sale and charged him with the expense of the second sale.

We do not think the appellant has any cause of complaint. By insisting that there was a sale of the property had on January 11, 1900, she affirmed the validity of said sale. It is apparent that if the first sale was valid, and the appellee confesses that such is the case by urging it as an objection to the second sale, the plaintiff is entitled to a deed, and the court, by making her an allowance for interest accruing after the date of the first sale and charging plaintiff with all expense of the second sale, gave her everything to which equity entitles her. Such being the case it is immaterial what, if any, objections existed to the second sale.

We recommend the affirmance of the order appealed from.

POUND, C., concurs.

AFFIRMED.

Chicago, B. & Q. R. Co. v. Beal.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v.
JOHN T. BEAL.

FILED MAY 6, 1903. No. 12,772.

Commissioner's opinion. Department No. 2.

1. **Railroads: FIRES: DAMAGES: EVIDENCE SUFFICIENT.** Evidence examined, and held sufficient to sustain the judgment of the trial court.
2. **Railroads. FIRES: DAMAGES: BURDEN OF PROOF.** "Where damage is caused by the escape of fire from a railroad engine, the burden is upon the company to show that the engine was properly constructed, equipped and operated." *Rogers v. Kansas City & O. R. Co.*, 52 Neb., 86, 71 N. W. Rep., 977.
3. **Railroads: FIRES: DAMAGES: EVIDENCE: PREJUDICE.** Action of the trial court in admitting evidence examined, and held not prejudicial.

ERROR from the district court for Kearney county.
Tried below before ADAMS, J. *Affirmed.*

J. W. Dewcese and Frank E. Bishop, for plaintiff in error.

Dailey & Paulsen, contra.

OLDHAM, C.

This is a suit for damages for the loss of four stacks of wheat alleged to have been consumed by fire negligently set out from one of defendant's engines. Defendant's answer was a general denial. There was a trial to a jury; verdict for plaintiff; judgment on the verdict, and defendant brings error to this court.

Defendant's chief contention is that the evidence is not sufficient to support the judgment and that the court erred in not directing a verdict for defendant at the close of the testimony.

A review of the evidence contained in the bill of exceptions discloses that the wheat stacks, owned by plaintiff, were from ten to eighteen rods south of the right

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of way of defendant's track; that the wheat stubble extended north from the stacks to the defendant's right of way; that on July 3, 1901, at some time from 5 to 6:30 o'clock P. M., these wheat stacks were discovered to be on fire; that one of defendant's trains, a freight, had passed along this right of way about 3:30 and also that a passenger train had passed through the premises about 4 o'clock or a little later on the afternoon of the fire. The evidence showed that when the wheat stacks were discovered to be on fire, the two north stacks were burning and the stubble north of the stacks and between them and the right of way was also burned. There is a dispute as to the direction the wind was blowing from at the time of the fire. It is conceded by all the witnesses that testify on this question that the wind had been blowing from the south during most of the day, but that during some time in the afternoon it changed its direction from the southwest to the northwest. Plaintiff's witnesses contend that the wind was blowing from the northwest at the time the fire occurred, while some of defendant's witnesses testify that it did not change to the northwest until after the fire had been discovered. There is some evidence in the record that there was alfalfa growing within the right of way, but as to the width of the strip or whether the fire burned through the alfalfa there is no testimony. The evidence shows, however, that the fire extended on south from the wheat stacks until it was checked by a public road. The railroad company introduced no testimony tending to show that the engines propelling its trains were supplied with spark arresters and other modern improvements to prevent the spread of fire, but appears to have relied on the theory that plaintiff's evidence was not sufficient to show that the fire was communicated from one of its engines.

We do not think we would be justified in saying as a matter of law that in view of this testimony there was no evidence tending to show that the fire originated from one of defendant's engines. We think the case falls within

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the rule announced by NORVAL, J., in *Rogers v. Kansas City & O. R. Co.*, 52 Neb., 86, 71 N. W. Rep., 977, when he says:

"It is true no witness testified to having seen the engine emitting sparks or coals of fire, but that was not absolutely essential to a recovery. The origin of the fire, like any other disputed question of fact, may be established by circumstantial evidence. While the testimony adduced in this case was not of the most convincing character, we can not say that no inference could be properly drawn therefrom that the fire resulted from sparks or coals cast out by the engine. On the contrary, we are persuaded that the proofs should have been submitted to the jury for their consideration, under proper instructions. The rule in this state is that when fire is set out by sparks from a passing engine, negligence may be inferred, and that the burden of proof is upon the company to establish that the engine was not faulty in construction, and was properly equipped and operated. *Burlington & M. R. R. Co. v. Westover*, 4 Neb., 268." *Kelsey v. Chicago & N. W. R. Co.*, 45 N. W. Rep. [S. Dak.], 204; *Grand Trunk R. Co. v. Richardson*, 91 U. S., 454; *Butcher v. Vaca Valley & C. L. R. Co.*, 67 Cal., 518.

The only other objection to the action of the trial court called to our attention in the brief of plaintiff in error is as to its overruling an objection to the testimony of plaintiff's wife, to the effect that the section foreman of the company came to her house, after the fire, and asked her about the grain that was burned, as to the number of acres, and said that he wanted to send in an application or report to the company as to whose grain it was and as to the amount of damage.

Able counsel for plaintiff in error say that ordinarily evidence of this kind would not be objectionable, but that in view of the fact that there was not sufficient evidence to show that the fire was started from defendant's engine, this testimony might have been taken by the jury as an admission of the company that it did start the fire.

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We have examined the record of the admission of this evidence and are satisfied that it was admitted for no such purpose. Plaintiff had alleged in his petition that he had presented his claim for damages to the company and that it failed and refused to pay the same; this allegation was denied by defendant's answer, and the evidence was probably admitted for the purpose of showing that plaintiff had made a claim of damage before the action was instituted. For this purpose it was unobjectionable, and if defendant desired to control it to this end and this alone, it should have done so by requesting a proper instruction. This it did not do.

Finding no reversible error in the record, we therefore recommend that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

THE ENLOW CATTLE COMPANY V. MALLOW B. GANOW ET AL.

FILED MAY 6, 1903. No. 12,776.

Commissioner's opinion. Department No. 3.

1. **Bills and Notes: DIRECTING VERDICT: EVIDENCE INSUFFICIENT.**
Evidence examined, and *held* that it was error to direct a verdict for the defendants.
2. **Bills and Notes: CONSIDERATION: AGREEMENT TO CONVEY: CONSTRUCTION.** A note, in the usual form, contained a stipulation on the back thereof in these words: "This note is not payable until the south half of the southeast quarter and the south half of the southwest quarter of section twenty-six, township 28, range 38, is deeded to M. B. Ganow." *Held*, (1) That the entire instrument did not of itself show an agreement to convey the land described in the stipulation. (2) That the defendant, by objecting to evidence as to the consideration for the note on the ground that the note itself showed the consideration, was not committed to the theory that the consideration for the note was such agreement to convey.

ERROR from the district court for Cherry county.
Tried below before WESTOVER, J. *Reversed.*

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Allen G. Fisher and H. H. Wilson, for plaintiff in error.

F. M. Walcott and M. F. Harrington, contra.

ALBERT, C.

This action was brought by the Enlow Cattle Company, against Mallow B. Ganow, Jacob A. Ganow and Thomas Gates, on a promissory note, executed by the defendant to one Bannon, and by him indorsed and transferred to the plaintiff. The note, as it appears in the petition, is as follows:

“\$1,400.

GORDON, NEB., May 6, 1898.

“November 1, 1899, after date, I promise to pay to the order of E. Bannon, fourteen hundred dollars, payable at the Exchange Bank, Lime Springs, Iowa, value received, with 10 per cent. interest from date, interest payable annually. Interest not paid when due shall draw interest at the rate of ten per cent. per annum, payable annually. If suit is commenced on this note, I agree to pay a reasonable attorney's fee for collecting the same.

“M. B. GANOW.

“J. A. GANOW.

“THOS. GATES.”

The defendant filed an answer and the defense therein relied upon now is that the following stipulation was indorsed on the back of the note, and signed by the payee at the time it was executed:

“This note is not payable until the south half of the southeast quarter and the south half of the southwest quarter of section twenty-six, township 28, range 38, is deeded to M. B. Ganow.”

That the agreement of the payee to convey the lands described in that stipulation, to the defendant Mallow B. Ganow, by warranty deed, was the only consideration for the note, and that such consideration had wholly failed.

The court directed a verdict for the defendants, and gave judgment accordingly. The plaintiff brings error.

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It will be observed that by the terms of the note the interest is payable annually; consequently, in order to sustain the action of the district court in directing a verdict, it must conclusively appear, not only that the stipulation hereinbefore mentioned was a part of the note, but also that there was a failure of consideration. Because, even though the time of payment of the principal sum is postponed by such stipulation, it is not claimed, and will not be, we think, that the payment of interest according to the terms of the face of the note is also postponed thereby.

In that view of the case, we do not think the judgment of the district court should be permitted to stand. The weak point in the record is on the question of the consideration for the note. On that question the evidence, to our minds, is not conclusive that the only consideration for the note is that alleged in the answer. In fact, the only evidence on the part of the defendants as to the consideration for the note, which the court permitted to stand, was that of Mallow B. Ganow, one of the defendants, and the party to whom the defendants claim the conveyance in question was to be made. On direct examination he testified that the only consideration for the note was that alleged in the answer. On cross-examination he admitted having testified in another action to the effect that the consideration alleged in the answer was but a small part of the consideration for the note. In other words, that his testimony in the other action flatly contradicted the defense of a failure of consideration. This was in the nature of an admission against interest, besides an impeachment of the witness on a material point, and the jury should have been permitted to decide which of his conflicting stories was true. It was error, therefore, for the court to direct a verdict for the defendants.

But the defendants contend that the plaintiff is estopped to deny that the agreement to convey the land was not the consideration for the note, because on the trial it objected to a question propounded to a witness by the de-

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defendants to elicit testimony as to the consideration for the note, on the ground, among others, "that the note itself shows the consideration." The theory of the defendants is that, by this objection, the plaintiff must have referred to the stipulation on the back of the note and that by interposing such objection, which was sustained, it thereby impliedly admitted that the agreement to convey the land described in said stipulation was the sole consideration for the note. If the stipulation on the note showed on its face an agreement to convey the land, and that such agreement was the consideration for the note, there might be some force in this contention. But such is not the case. The stipulation, on its face, merely makes the note payable on the happening of a future event. There is no more ground to hold that the objection had reference to it, than that it had reference to the phrase "value received." Just what it does refer to is not quite clear. So long as neither the note taken as a whole, nor the objection, mentions any specific consideration it is purely a matter of conjecture what the plaintiff had in mind when the objection was made, and it would be a harsh application of a harsh rule to read into the objection or the note the specific consideration which fits the defendants' theory of the case.

It is therefore recommended that the judgment of the district court be reversed.

AMES and DUFFIE, CC., concur.

REVERSED AND REMANDED.

Eldridge v. Wesierski.

ISABELLA ELDRIDGE, APPELLANT, v. PAUL WESIERSKI ET AL.,
APPELLANTS.

FILED MAY 6, 1903. No. 12,822.

Commissioner's opinion. Department No. 2.

Mortgages: FORECLOSURE: DESCRIPTION: SALE OF SEPARATE TRACTS.

Where a decree of foreclosure provides that the land shall be sold in separate tracts, and the notice of sale gives a separate description of each of such tracts, the omission to state in the notice that the tracts are to be separately sold is not a valid objection to confirmation.

APPEAL from the district court for Sherman county.
Tried below before SULLIVAN, J. *Affirmed.*

R. J. Nightingale, for appellants.

H. M. Mathew, contra.

ALBERT, C.

This is an appeal from an order confirming a sale of real estate under a decree of foreclosure. The decree covers 820 acres of land lying in two adjoining quarter sections, provides that it shall be sold in three separate tracts and prescribes the order in which it should be sold. The notice of sale described each of the three tracts, but did not state that they would be sold separately. The land was sold in the order and manner prescribed by the decree.

The only objection urged against confirmation is that the notice of sale did not state that the land was to be sold in three separate tracts. It is insisted that such omission was calculated to induce the belief that the land was to be sold in a body and was on that account liable to mislead and deter bidders and to prevent the property from bringing its fair value. The objection does not seem to us to be well founded. There was nothing in the notice calculated to induce the belief that the land was to be sold in a body. On the contrary, that two of the tracts lying

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in the same quarter section were separately described in the notice of sale, was of itself a strong intimation at least that the land was to be sold in separate tracts, and was sufficient notice of that fact if notice thereof was required. There is no complaint that the land did not bring its fair value and we think the objection to the confirmation of the sale was properly overruled.

It is recommended that the order of confirmation be affirmed.

BARNES and GLANVILLE, CC., concur.

AFFIRMED.

THOMAS K. SUDBOROUGH V. THE PACIFIC EXPRESS COMPANY ET AL.

FILED MAY 20, 1903. No. 12,377.

Commissioner's opinion. Department No. 1.

1. **Malicious Prosecution: DIRECTING VERDICT: EVIDENCE SUFFICIENT: PROBABLE CAUSE.** Where the evidence in an action for malicious prosecution, showing that the defendant had reasonable and probable ground for believing plaintiff guilty of the crime charged against him, is of such a character that reasonable minds could not differ as to the conclusion to be drawn therefrom, it is not error for the court to direct a verdict for defendant.
2. **Malicious Prosecution: DIRECTING VERDICT: EVIDENCE SUFFICIENT.** Evidence examined, and *held* to sustain the action of the trial court in directing a verdict for defendant.

ERROR from the district court for Douglas county.
Tried below before SLABAUGH, J. *Affirmed.*

Jefferis & Howell, for plaintiff in error.

The question of probable cause, want of malice and advice of counsel are at once destroyed as a defense, if it were established, as a fact, that the corporation prosecuted the plaintiff knowing him to be innocent. Whether or not such a prosecution was instituted was not a question of

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law for the court to determine in this case, but one of fact to be submitted to the jury. If there is a conflict of evidence as to the defendants' knowledge of explanatory circumstances, the question of probable cause must be submitted to the jury under proper instructions from the court, telling them if they should find so-and-so there would be probable cause, and if they did not find so-and-so, there would be no probable cause. *Woodworth v. Mills*, 61 Wis., at page 60; *Fagan v. Knox*, 1 Abb. N. O. [N. Y.], 246; *Sanders v. Palmer*, 55 Fed. Rep., 220; *Anderson v. Friend*, 71 Ill., at page 480; *Richardson v. Spangle*, 60 Pac. Rep. [Wash.], 64; *Dreyfus v. Aul*, 29 Neb., at page 195; *Peterson v. Reisdorph*, 49 Neb., at page 531; *Casebeer v. Rice*, 18 Neb., at page 214; *Nehr v. Dobbs*, 47 Neb., at page 866; *Blunk v. Atchison, T. & S. F. R. Co.*, 38 Fed. Rep., 313; *Wilson v. Bowen*, 31 N. W. Rep. [Mich.], at page 83; *Richardson v. Dybedahl*, 84 N. W. Rep. [S. Dak.], 486; *McClay v. Hicks*, 77 N. W. Rep. [Mich.], 636.

The point of inquiry in these cases always is whether the defendant had probable cause, upon the existing facts known to him, to maintain the particular charge made. *Wills v. Noyes*, 29 Mass., 324.

If there be an honest belief of guilt and there exists reasonable grounds for such belief, the prosecution may be justified. Yet, however suspicious the appearance may be from existing circumstances, if the prosecutor has knowledge of facts which will explain the suspicious appearances and exonerate the accused from a criminal charge, the accuser can not justify a prosecution by putting forth his *prima facie* circumstances and excluding those within his own knowledge which tend to prove innocence. *Bauer v. Clay*, 8 Kan., 580; *Shaul v. Brown*, 28 Ia., 46; *Carl v. Ayers*, 53 N. Y., at page 16; *George v. Johnson*, 25 App. Div. [N. Y.], at page 126; *Plummer v. Johnson*, 35 N. W. Rep. [Wis.], 334; *Galloway v. Stewart*, 49 Ind., at page 158, 160; *Flackler v. Novak*, 63 N. W. Rep. [Ia.], 348, 349; *Brooks v. Bradford*, 36 Pac. Rep. [Colo.], 303; *Wass v. Stevens*, 28 N. E. Rep. [N. Y.], 21; *Ross v. Langworthy*,

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13 Neb., at page 495; *Turner v. O'Brien*, 5 Neb., at page 547; *Hazzard v. Flury*, 24 N. E. Rep. [N. Y.], 194; *Nehr v. Dobbs*, 47 Neb., at page 866.

It is the duty which every man owes to every other man, not to institute criminal proceedings which he has no good reason to believe are justified by the facts and the law. Cooley, Torts [2d ed.], section 181. And where one prosecutes knowing the facts do not authorize it, he is liable and there is no probable cause. *Flackler v. Novak*, 63 N. W. Rep. [Ia.], 348-350.

It must necessarily follow, therefore, that if a prosecutor, or one who institutes a criminal prosecution, knows the accused to be innocent, he can not believe him to be guilty. All persons are bound to know the law. If the prosecutor knows the true facts and those facts could not constitute the accused a criminal, when applied to a correct rule of law, a prosecution under those facts, when erroneously applied to the rule of law, can not be justified. A prosecutor, or one instituting prosecution, is chargeable with what he actually knows, and all exculpatory facts which exist and which might have been known by reasonable inquiry. *Jessup v. Whitehead*, 29 Pac. Rep. [Colo.], 916; *Paddock v. Watts*, 18 N. E. Rep. [Ind.], at page 520; *Norrel v. Vogel*, 38 N. W. Rep. [Minn.], 705; *Merchant v. Pielke*, 84 N. W. Rep. [N. Dak.], 576; *Reisterer v. Lee Sum*, 94 Fed. Rep., 343; *Denver, S. P. & P. R. Co. v. Conway*, 5 Pac. Rep. [Colo.], 146.

Probable cause is a question of law when the facts are undisputed; but it is not for the court to weigh conflicting evidence in an action for malicious prosecution, so as to establish undisputed facts. *Kolka v. Jones*, 71 N. W. Rep. [N. Dak.], 558; *Stricker v. Pennsylvania R. Co.*, 37 Atl. Rep. [N. J.], 776; *Palmer v. Palmer*, 40 N. Y. Supp., 829; *Seabridge v. McAdam*, 41 Pac. Rep. [Cal.], 409.

Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable man's mind, acting on the facts within the knowledge of the prosecution, that the person charged was guilty of the

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crime for which he was prosecuted. *Rider v. Murphy*, 47 Neb., 857.

In addition to the above, the defendant must use all the means which ordinarily reasonable and prudent men would exercise, to learn the circumstances of the case. *Tabert v. Cooley*, 13 L. R. A. [Minn.], 463; *Donnelly v. Burkett*, 75 Ia., 613; *Flackler v. Novak*, 94 Ia., at page 639.

Facts not known to the defendant at the time of his causing plaintiff's arrest, are not competent to show the presence or absence of probable cause. *Stewart v. Sonneborn*, 98 U. S., 187, 25 L. Ed., 116, 119; *Cecil v. Clarke*, 17 Md., 508; *Smith v. King*, 62 Conn., 515; *Natchman v. Hammer*, 155 Pa. St., 200.

It may be contended that the commitment by the examining magistrate was conclusive of probable cause. At most it is *prima facie* evidence of probable cause. *Ross v. Hixon*, 12 L. R. A. [Kan.], 760; *Ganea v. Southern P. R. Co.*, 51 Cal., 140; *Diemer v. Herber*, 17 Pac. Rep. [Cal.], 205; *Hess v. Oregon German Banking Co.*, 49 Pac. Rep. [Ore.], 803; *Cuthbert v. Galloway*, 35 Fed. Rep., 466; *Johnston v. Meaghr*, 47 Pac. Rep. [Utah], 861; *Sweeney v. Perney*, 19 Pac. Rep. [Kan.], 328; *Dearmond v. St. Amant*, 4 So. Rep. [La.], 72; *Nehr v. Dobbs*, 47 Neb., at pages 866, 867, 66 N. W. Rep., 864.

The defendants also relied on the advice of counsel. It is a familiar rule of law in this state, that "advice of counsel, to be of any avail, must have been given after a full and fair statement of all the facts within the knowledge of the person seeking the same, and must have been relied upon in good faith." *Biddle v. Jenkins*, 61 Neb., 400, 85 N. W. Rep., 392.

Advice of counsel is not a complete defense to an action for malicious prosecution. *Morgan v. Duffy*, 30 S. W. Rep. [Tenn.], 735; *Johnson v. Miller*, 29 N. W. Rep. [Ia.], 743.

If the party seeking the advice withholds any material fact, such advice will not protect him. *Dreyfus v. Aul*, 29 Neb., 191; *Peterson v. Reisdorph*, 49 Neb., 529.

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Where defendant seeks to justify the prosecution on advice of counsel, he must show that he stated to such counsel all the facts within his knowledge, and all that he could ascertain with reasonable diligence and inquiry, and received such advice and prosecuted thereon honestly and in good faith. *Merchant v. Pielke*, 84 N. W. Rep. [N. Dak.], 574.

If the advice of counsel is obtained upon a given state of facts, which is utterly unfounded, such advice can not avail as a defense to an action for malicious prosecution. *Gann v. Varnado*, 25 So. Rep. [La.], at page 86; *Decoux v. Lieux*, 33 La. Ann., 392; *Glascock v. Bridges*, 15 La. Ann., 672; *Grundy v. Crescent News & Hotel Co.*, 38 La. Ann., 974; *Cointement v. Cropper*, 41 La. Ann., 303, 6 So. Rep., 127.

If the prosecuting witness, or party causing the prosecution, has reason to believe that exculpatory facts exist, he must make inquiry and inform counsel of such belief in order to rely upon advice of counsel. *Scrivani v. Dondero*, 60 Pac. Rep. [Cal.], 463.

The rule as to the advice of the prosecuting attorney, and other counsel, is the same. *Thompson v. Lumley*, 50 How. Prac. [N. Y.], 105; *Johnson v. Miller*, 19 N. W. Rep. [Ia.], 310.

In this case it is testified by the prosecuting attorney and the Pacific Express Company witnesses, that Mr. Baldrige said to all the parties seeking to prosecute: "If what you say is true, then you are justified in filing an information," and further, that the prosecuting attorney did not pretend to vouch for the truthfulness of any of the statements. This testimony completely eliminates all question of the advice of counsel. The burden of showing the advice of counsel, by preponderance of the evidence, is upon the defendant. *Manning v. Finn.*, 23 Neb., 511. Furthermore, the defense must show what facts were communicated to counsel. *Jonasen v. Kennedy*, 39 Neb., 313.

It is also a question of fact for the jury to determine whether or not, where advice of counsel is relied upon, the

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facts were fully disclosed to such counsel. *McLeod v. McLeod*, 73 Ala., 42; *Potter v. Scale*, 8 Cal., 217; *Seabridge v. McAdam*, 41 Pac. Rep. [Cal.], 409; *Anderson v. Friend*, 71 Ill., 475; *Connery v. Manning*, 39 N. E. Rep. [Mass.], 558; *Thompson v. Price*, 59 N. W. Rep. [Mich.], 253; *Smith v. Walter*, 17 Atl. Rep. [Pa.], 466.

It is also a question of fact for the jury to determine whether the prosecution was in good faith, believing the person, charged with crime, guilty. *Johnson v. Miller*, 19 N. W. Rep. [Ia.], 310.

It may be contended that Mr. Young had charge of this prosecution, and that he did not know anything about the matters except as Hunt told him. This is not a sufficient excuse as to the corporation. We grant it may be sufficient as to Mr. Young in his individual capacity. Knowledge acquired by the company can not be buried or destroyed by change of officers. The corporation here seeks to deny that Sudborough was authorized to make certain expenditures, therefore, denies the knowledge of his authority to expend. Notice to an administrative officer of a material fact is notice to the corporation. *Liebefritz v. The Dubuque Street R. Co.*, 48 Ia., 709; *Quincy Coal Co. v. Hood*, 77 Ill., at page 75; *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb., at page 416; *Reed Brothers v. First National Bank*, 46 Neb., 168; *Pikes Peak Power Co. v. City of Colorado Springs*, 105 Fed. Rep., at pages 10, 11; *Smith v. Board of Water Commissioners*, 38 Conn., 208; *White v. Barlow*, 72 Ga., 887; *Indiana I. & I. R. Co. v. Swannell*, 157 Ill., 616, 41 N. E. Rep., 989; *Conant, Ellis & Co. v. Reed*, 1 Ohio St., 298.

On the question of notice to corporations, through its agents or officers, see, also, *Sloan v. Southern California R. Co.*, 44 Pac. Rep. [Cal.], 320; *Denver, S. P. & P. R. Co. v. Conway*, 5 Pac. Rep. [Colo.], 142; *Conro v. The Port Henry Iron Co.*, 12 Barb. [N. Y.], 27; *The Pittsburg, F. W. & C. R. Co. v. Ruby*, 38 Ind., 294, 10 Am. Rep., 111.

That notice to an agent is notice to his principal, as a general proposition, needs no citations. It is conclusively

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presumed that an agent communicates his knowledge, acquired in his line of duty, to his principal. 3 Clark and Marshall, Private Corporations, page 2207, section 723; *Howison v. Alabama Coal & Iron Co.*, 70 Fed. Rep., 683, 698, 699.

Cases may be found which hold that knowledge possessed by one agent, not connected in any manner with the subject-matter of the duties being performed by another agent, is not notice to the company. Such is the rule in the Iowa case cited by counsel for defendants in error, and such was the holding of a Michigan case, *Great Western R. Co. v. Wheeler*, 20 Mich., 419. They are not applicable to the case at bar. The true rule, and one not in conflict with the Iowa and Michigan cases, is as follows:

"When, at the time of a transaction, a corporation has notice by reason of the knowledge of an officer or agent, such notice is not affected by the subsequent death of the officer or agent, or other termination of agency." 3 Clark and Marshall, Private Corporations, page 2206, section 722; *Birmingham Trust & Savings Co. v. Louisiana National Bank*, 99 Ala., 379, 13 So. Rep., 112, 115; *Howison v. Alabama Coal & Iron Co.*, 70 Fed. Rep., 683, 689-699.

Mr. Morsman, during all this time, was a member of the board of directors, and all the knowledge he possessed came to him while such member, and while in the performance of his duties officially. This was notice to the company. *Cumberland Coal & Iron Co. v. Sherman*, 30 Barb. [N. Y.], 553; *Farmers' and Citizens' Bank v. Payne*, 25 Conn., 444, 68 Am. Dec., 362; *Smith v. The South Royalton Bank*, 32 Vt., 341, 76 Am. Dec., 179; 3 Clark and Marshall, Private Corporations, page 2205, section 721; 1 Morawetz, Private Corporations [2d ed.], pages 511, 512, sections 540b, 540c.

W. W. Morsman, contra.

The undisputed facts showed there was probable cause for believing Sudborough guilty of the offense as charged. When the facts are established without dispute or con-

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flict, the question of probable cause is a pure question of law which it is the duty of the court to determine without submission of the case to the jury, and it is wholly immaterial whether the plaintiff was or was not guilty of the offense charged in the criminal prosecution, except as proof of guilt would establish the existence of probable cause. *Turner v. O'Brien*, 5 Neb., 542; *Travis v. Smith*, 1 Pa. St., at page 237; *Jonascn v. Kennedy*, 39 Neb., 313, 319; *Dreyfus v. Aul*, 29 Neb., 191, 197; *Hagelund v. Murphy*, 54 Neb., 545; *Meyer v. Louisville, &c., R. Co.*, 98 Ky., 365, 33 S. W. Rep., 98; *Albin Co. v. Mumford*, 55 S. W. Rep. [Ky.], 913.

The defendant not only laid the whole case before the county attorney, but the county attorney himself took charge of the investigation and collected all evidence and officially determined that the prosecution should be instituted and what charges should be made. Where a complaining witness fully and fairly lays before counsel all of the facts bearing upon the guilt of the accused within his knowledge, and after having exercised reasonable diligence to obtain knowledge, and in good faith acts upon the advice of such counsel in instituting the prosecution, an action for malicious prosecution can not be maintained. *Peterson v. Reisdorph*, 49 Neb., 529; *Dreyfus v. Aul*, 29 Neb., 191. And the rule is even stronger where the matter is placed in the control of the public prosecutor and he officially undertakes an investigation for the discovery of the facts, and assumes responsibility for the prosecution. *Smith v. Austin*, 13 N. W. Rep. [Mich.], 593.

It is the duty of the county attorney to prosecute, and, incidentally, he has authority to determine, and is charged with the duty of determining, whether or not there is probable cause. Compiled Statutes, chapter 7, sections 16, 17 [Annotated Statutes, sections 9140, 9141].

The knowledge of an agent which constitutes notice to the principal is such knowledge as the agent possesses or receives in the course of the very transaction which becomes the subject of the suit. But knowledge obtained

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by one agent, while engaged in a particular transaction, is not notice to the principal when acting through another agent in respect to a different transaction. Story, Agency [9th ed.], section 140; *Congar v. The Chicago & N. W. R. Co.*, 24 Wis., 157.

It is held in many courts that the judgment of a court of competent jurisdiction is conclusive evidence of probable cause, even though it be reversed on appeal, unless it is alleged and proved that the judgment was obtained by fraud, or perjury of the prosecuting witness, or subornation of perjury by him. *Cloon v. Gerry*, 13 Gray [Mass.], 201; *Whitney v. Peckham*, 15 Mass., 243; *Phillips v. Village of Kalamazoo*, 18 N. W. Rep. [Mich.], 547; *Crescent City Live Stock Co. v. Butcher's Union Slaughter-House Co.*, 120 U. S., 141, 159; *Root v. Rose*, 72 N. W. Rep. [N. Dak.], 1022; *Parker v. Farley*, 10 Cush. [Mass.], 279; *Dennehey v. Woodsum*, 100 Mass., 195; *Knight v. International & G. N. R. Co.*, 23 U. S. App., 356; *Johnson v. Miller*, 63 Ia., 529; *Bowman v. Brown*, 52 Ia., 437.

The same effect is given to the judgment of a justice of the peace on preliminary examination. *Ganea v. Southern Pacific R. Co.*, 51 Cal., 140; *Diemer v. Herber*, 75 Cal., 287. But the cases are not in harmony. *Ross v. Hixon*, 12 L. R. A. [Kan.], 760.

This court, in a well considered case, decided upon principle, and upon review of the leading cases, has laid down the rule that the effect of a judgment may be rebutted by pleading and proving "any facts which show that the conviction was under circumstances depriving it of any naturally probative effect." *Nehr v. Dobbs*, 47 Neb., 863.

KIRKPATRICK, C.

This is an action brought by Thomas K. Sudborough, plaintiff in error, against the Pacific Express Company and Erastus Young, defendants in error, to recover damages for malicious prosecution. Trial was had to the district court for Douglas county, lasting many days, at which a large amount of testimony was taken on behalf

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of both parties. At the conclusion of the testimony the court, on motion of defendants in error, instructed the jury to bring in a verdict for defendants in error, and from the judgment entered upon such verdict error is prosecuted to this court. Many questions are presented in the argument which do not seem to require determination. We have very carefully read all of the evidence in the record, and are forced to the conclusion that the undisputed evidence establishes beyond question probable cause to believe that plaintiff in error was guilty of the crime charged. It would not subserve any good purpose to enter upon an extended discussion of this evidence. For many years prior to 1897 the Pacific Express Company, at its headquarters in the city of Omaha, was being systematically robbed by some of its employees. These peculations and embezzlements seem to have amounted to between \$40,000 and \$50,000. Plaintiff in error himself seems to have admitted that his own embezzlements amounted to more than \$14,000, all of which he claimed were outlawed at the time he made the confession, and because of which he seems never to have been prosecuted. The case is in very many respects like that of *Bechel v. Pacific Express Co.*, 65 Neb., 826, 91 N. W. Rep., 853, and arose out of the same series of robberies and embezzlements as in this case. The questions presented in the case at bar are the same as those presented and determined in the case above referred to. With the conclusion reached there we are content.

The undisputed evidence being such as to establish beyond question probable cause to believe plaintiff in error guilty of the offense of which he was charged, the directed verdict of the trial court, and judgment thereon, are right, and it is recommended that the same be affirmed.

HASTINGS, C., concurs.

AFFIRMED.

Hayek v. Pracheil.

FRANK J. HAYEK, APPELLANT, v. ADOLPH PRACHEIL ET AL.,
APPELLEES.

FILED MAY 20, 1903. No. 12,643.

Commissioner's opinion. Department No. 2.

Creditors' Suit: EVIDENCE OF JUDGMENT: EXECUTION. In order to maintain an action in the nature of a creditors' bill in aid of execution, to set aside a deed and subject the land described therein to the payment of a judgment, it is necessary to prove, by some competent evidence, the existence of a valid judgment.

APPEAL from the district court for Saline county.
Tried below before STUBBS, J. *Affirmed.*

F. I. Foss and B. V. Kohout, for appellant.

Hastings & Hastings, contra.

BARNES, C.

This is a suit in the nature of a creditors' bill in aid of execution, brought against Adolph Pracheil and Barbara Prachiel, his wife, to set aside two certain deeds of real estate and subject the land conveyed thereby to the payment of a judgment which appellant alleged he had obtained and holds against Adolph. One of the deeds mentioned in the petition was executed by Adolph Prachiel and his wife, Barbara, to one Edward Eckert, by which they, for the alleged consideration of \$1, conveyed the north half of the southeast quarter of section 16, township 7, range 4 east, to him, and the other was immediately thereafter executed by Eckert to Barbara Prachiel, so that Adolph, as a matter of fact, conveyed the land in question to his wife by and through the intervention of a third party. It was alleged in the petition, among other things, that the plaintiff had obtained a judgment against Adolph Pracheil; that he had had a transcript thereof filed in the office of the clerk of the district court for Saline county; that an execution had been issued thereon

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and levied on the land in question. But it was not alleged in the petition that an execution had ever been issued and returned unsatisfied in whole or in part for want of goods and chattels whereon to levy. Defendants answered the petition and denied each and every allegation contained therein not specifically admitted. It was alleged in the answer that the defendants were husband and wife, and for more than four years had been and were still residing on the land in question as their homestead; that neither of them owned or possessed any other further or different land, town lots or houses subject to exemption as a homestead. It was alleged that the consideration for the deeds in question was \$800 paid by Barbara Pracheil to her husband, Adolph; that there was a mortgage of \$500 and interest amounting to \$30 on the land, which was a valid and subsisting first lien on the premises. These allegations were denied by the reply. The cause was tried to the court without a jury and at the close of the evidence the court found generally for the defendants and dismissed the plaintiff's action. From that judgment plaintiff appealed to this court.

An examination of the evidence satisfies us that the land was conveyed from Adolph Pracheil to his wife for the purposes alleged in the appellant's petition. But it further appears that it is the homestead of the defendants and as such, under our law, it was not the subject of fraudulent alienation unless its value exceeded the sum of \$2,000, and in that event the surplus can be reached by the proper proceeding and subjected to the payment of the appellant's claim. The findings and judgment of the district court will nevertheless have to be affirmed, because there is no competent evidence in the record to prove that the appellant has a judgment as alleged in his petition, or that any execution has ever been issued thereon.

At the trial, H. H. Hendee, county judge of Saline county, testified that in his record he found a judgment against Jan Melick and Adolph Pracheil, but it was not

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identified as the one described in appellant's petition. The clerk of the district court testified that "a transcript was filed in his office on March 14, 1901, of Frank J. Hayek against Jan Melick and Adolph Pracheil." This is the only reference to the procurement of a judgment or the issuance of an execution thereon, and nothing further in relation to this matter can be found in the record. The judgment was neither offered nor introduced in evidence, nor does a copy of it anywhere appear in the bill of exceptions. This evidence was insufficient to establish the existence of a valid judgment as alleged in the petition of the appellant. *Burge v. Gandy*, 41 Neb., 149.

There is a total want of proof to show that any execution was ever issued or delivered to the sheriff or by him returned unsatisfied in whole or in part. It is true, however, that it is alleged in the petition that an execution had been issued on the judgment and levied on the land in question, and it was sought to set aside the conveyances in aid of such execution. This may be done in a proper case, but in order to authorize the court to grant such relief some competent evidence must be introduced to establish the fact of the issuance of the execution and that it had been levied on the land in question. *Krouskop v. Krouskop*, 70 N. W. Rep. [Wis.], 475; *Hughes v. Hunner*, 64 N. W. Rep. [Wis.], 887; *Weaver v. Cressman*, 21 Neb., 675; 4 Am. & Eng. Ency. Law [1st ed.], 573.

Without doubt the general finding of the court in favor of the appellees was based on this total want of competent evidence to sustain the action. Under the facts proved herein no judgment could have been rendered except one of dismissal.

We therefore recommend that the judgment of the district court be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

Fremont Brewing Co. v. Pekarek.

FREMONT BREWING COMPANY V. MIKE PEKAREK.

FILED MAY 20, 1903. No. 12,672.

Commissioner's opinion. Department No. 2.

1. **Attachment: DISSOLUTION: EVIDENCE CONFLICTING: AFFIDAVITS: FINDINGS.** On disputed questions of fact tried on *ex-parte* affidavits in support of a motion to dissolve an attachment, the findings of the trial court will not be disturbed unless clearly against the weight of the evidence.
2. **Attachment: EVIDENCE SUFFICIENT.** Evidence examined, and *held* sufficient to support the judgment of the trial court.

ERROR from the district court for Saunders county. Tried below before SORNBORGER, J. *Affirmed.*

E. F. Gray and Tarpenning & Placek, for plaintiff in error.

E. E. Good and G. W. Simpson, contra.

OLDHAM, C.

On December 26, 1901, the Fremont Brewing Company instituted its suit on six promissory notes of \$100 each. These notes were all dated April 30, 1901, and due in two, three, four, five, six and seven months after date respectively. The plaintiff filed an affidavit for an attachment alleging numerous statutory grounds therefor, and caused the same to be levied upon a saloon stock, formerly owned by the defendant, and also summoned the Bank of Weston to answer as garnishee. Defendant subsequently filed a motion to dissolve the attachment because the facts stated in the affidavit were not sufficient to justify the issuing of the same and because the facts alleged in the affidavit were untrue. These issues of fact were tried to the court on affidavits and counter-affidavits filed by the contending parties and were determined in favor of the defendant. The attachment was accordingly discharged and plaintiff brings error to this court.

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While numerous statutory grounds for attachment were alleged in plaintiff's affidavit, only two of these were supported by any testimony; one was that the debt had been fraudulently contracted, the other that the defendant was converting his property into money for the purpose of defrauding creditors.

It appears without dispute that the defendant had been engaged in the saloon business in Weston, Saunders county, Nebraska, from April, 1900, until June 7, 1900, in connection with a partner, at which time the partnership was dissolved and defendant continued in the business in his own name until November 1, 1901, at which time he sold out his business for the alleged price of \$1,650. It also appears that all the time the defendant was engaged in business he purchased beer from the plaintiff; in fact rented the building in which his saloon was conducted from it, and bound himself to sell plaintiff's beer or else pay an additional sum of \$600 per annum for the use of the premises if he failed to do so. It appears that in 1900 defendant was the owner of a quarter section of land in Butler county, Nebraska, valued at about \$3,000, subject to a mortgage of \$1,000. It is alleged in plaintiff's affidavit that, for the purpose of procuring credit from the brewery, defendant represented to them that he was the owner of this land free from incumbrances. This fact, however, is positively denied in defendant's affidavit and he alleges that he never made any property statement for the purpose of procuring credit, but that he was compelled under the condition of his lease to sell plaintiff's beer or else pay an additional rental of \$50 per month for the use of its building. September 13, 1900, and long before the notes in controversy were given, defendant sold his lands in Butler county to his brother-in-law for a consideration of \$2,500, \$1,500 of which were alleged to have been paid in cash, and the mortgage of \$1,000 assumed by the purchaser. Defendant claims that he expended \$500 of this purchase money on his homestead in Weston, and used the other \$1,000 in his business. It appears without

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dispute that defendant had complained to plaintiff that his business was a losing one and had requested its officers to aid him in disposing of his stock. At the end of the license year defendant was in debt to the plaintiff in the sum of \$400 for beer and also applied for a loan of \$600 to procure a renewal of his license; the advance was made and plaintiff took ten promissory notes of \$100 each, maturing a month apart, in payment of this indebtedness, and the six unpaid notes of this series are the foundation of this cause of action.

Defendant accounts fully and particularly for all the money which he received for the sale of the saloon in November, 1901, and shows that he applied it all to the payment of his debts, some of which went to plaintiff, with the exception of the unpaid \$600 note which was in the Bank of Weston.

It is strongly urged by counsel for plaintiff in error that we should review these conflicting affidavits and declare that the judgment of the trial court was plainly against the weight of the evidence. It is urged that as all this testimony was heard on *ex-parte* affidavits, the trial judge had no advantage over the reviewing court in determining the credibility of the witnesses nor the weight to be attached to their testimony, and that in the case at bar we should determine the facts on the weight of the testimony uninfluenced by the findings of the lower court.

While we might not feel so firmly bound by a finding of fact made by a trial judge on proof consisting solely of *ex-parte* affidavits as we would by a finding of fact made where the witnesses are examined and cross-examined in his presence, yet the rule is well established in this state that even on disputed questions of fact tried on affidavits in support of a motion to dissolve an attachment, the findings of the trial court will not be disturbed unless clearly against the weight of the evidence. *Johnson v. Steele*, 23 Neb., 82; *Dolan v. Armstrong*, 35 Neb., 339, 53 N. W. Rep., 132; *Geneva National Bank v. Bailor*, 48 Neb., 866, 67 N. W. Rep., 865. We might say further, even if this were

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not the rule, a careful examination of all the evidence contained in the bill of exceptions leads us to the conviction that the judgment of the trial court is clearly supported by the weight of the evidence.

It is therefore recommended that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

I. R. POSTAL, OVERSEER OF ROAD DISTRICT NO. 19 OF STANTON COUNTY, NEBRASKA, v. JOSEPH MARTIN.

FILED MAY 20, 1903. No. 12,731.

Commissioner's opinion. Department No. 3.

1. **Counties: JURISDICTION: HIGHWAYS: RECORDS: LAPSE OF TIME.**
Whenever it becomes necessary to invoke the record of proceedings of an official tribunal of limited powers for the purpose of establishing a substantive right or title, it is indispensable to the success of the party relying thereupon that it be shown affirmatively that the body had acquired jurisdiction of the subject of its action. If he fails so to do, the mere lapse of time will not supply the omission.
2. **Limitation of Actions: ADVERSE POSSESSION: MEANING OF STATUTE.**
It has for many years been the established doctrine of this court that the statute of limitations, with reference to real property, is neither a statute of presumptions nor one of repose, but that the continued, exclusive, open, notorious and adverse possession of lands for the period of limitations, operates of itself, as a grant of all adverse titles and interests to the occupant.
3. **Easement: HIGHWAYS: EVIDENCE OF INTENT.** The passive permission by the owner of lands of the use of them by the public, is not alone evidence of an intent to dedicate them to such use.
4. **Easement: HIGHWAYS: ADVERSE POSSESSION: CONFLICTING EVIDENCE: APPEAL.** The question whether the public has acquired by exclusive adverse possession and user an easement for highway purposes, is one of fact which, when decided by the district court from conflicting evidence, will not ordinarily be re-examined upon an appeal.

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ERROR from the district court for Stanton county. Tried below before GRAVES, J. *Affirmed.*

G. A. Eberly, county attorney, for plaintiff in error.

Where a public road has been established by proceedings under the statute, and open and traveled by the public for more than ten years the public thereby acquire an easement therein, and the court will not examine the original proceedings for the laying out of the road to determine whether or not they were valid. *City of Beatrice v. Black*, 28 Neb., 263; *Lydick v. State*, 61 Neb., 309.

It is not indispensable to the establishment of a highway by adverse user, that there be no deviation in the line of travel. If the travel has remained substantially unchanged, it is sufficient, even though at times, to avoid encroachments or obstructions upon the road, there may have been slight deviations from the common way. *Nelson v. Jenkins*, 42 Neb., 133; *Streeter v. Stalnaker*, 61 Neb., 205; *City of Beatrice v. Black*, 28 Neb., 263.

Dedication may be presumed from lapse of time. *State v. County Commissioners of Otoe County*, 6 Neb., 129.

The statute of limitations does not run against a state. *Blazier v. Johnson*, 11 Neb., at page 405, 9 N. W. Rep., 543.

Title to a public highway can not be acquired by adverse possession by a private person and one can not acquire by adverse possession the right to shut up or obstruct a highway. *City of Visalia v. Jacob*, 65 Cal., 434, 52 Am. Rep., 303; *Commonwealth v. Moorehead*, 118 Pa. St., 344; *Heddleston v. Hendricks*, 52 Ohio St., 460, 40 N. E. Rep., 408; *Depriest v. Jones*, 21 S. E. Rep. [Va.], 478; *Krueger v. Jenkins*, 59 Neb., 641, 81 N. W. Rep., 844.

Allen & Reed, contra.

No notice of the application for the establishment of the road is shown by the record to have been given.

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Notice is the life of judicial and *quasi-judicial* proceedings. Without it the proceedings are void. General Statutes, chapter 67, section 19; *Robinson v. Mathwick*, 5 Neb., at page 255; *State v. County Commissioners of Otoe County*, 6 Neb., at page 133; *Doody v. Vaughn*, 7 Neb., at page 31; *Sioux City & P. R. Co. v. Washington County*, 3 Neb., at page 41; *Lcsicur v. Custer County*, 61 Neb., at page 613; *State v. Berry*, 12 Ia., 58. As bearing upon the necessity of jurisdiction and a compliance with the statute appearing upon the face of the commissioners' record, see also the following cases: *Beatty v. Beethe*, 23 Neb., 210; *Commissioners of Wabaunsee County v. Muhlenbacker*, 18 Kan., at page 132; *Oliphant v. Commissioners of Atchison County*, 18 Kan., at page 390; *Barker v. The Board of Commissioners of Wyandotte County*, 45 Kan., 694; *State v. Horn*, 34 Kan., at page 562.

The first finding of fact clearly discloses that the *locus in quo* was wild, uninclosed prairie land in 1885, and under such circumstances there is no such thing as a highway by prescription. *Graham v. Hartnett*, 10 Neb., at page 522; *Rathman v. Norenberg*, 21 Neb., 467; *Engle v. Hunt*, 50 Neb., 358; *Shaffer v. Stull*, 32 Neb., at page 98; *Nelson v. Jenkins*, 42 Neb., at page 137; *State v. Horn*, 35 Kan., 717; *Fox v. Virgin*, 11 Ill. App., 513; *People v. Livingston*, 27 Hun [N. Y.], 105; *Gray v. Haas*, 67 N. W. Rep. [Ia.], 394; *Smith v. Smith*, 34 Kan., at page 301; *State v. Kansas City, St. J. & C. B. R. Co.*, 45 Ia., 139; *The Missouri, K. & T. R. Co. v. Long*, 27 Kan., at page 696.

A highway may be established in one of three ways:

1. By an exercise of the sovereign power of eminent domain.
2. By dedication.
3. By prescription, or, as it is sometimes called, by user.

The highway in question does not fall within the first subdivision above because all proceedings in aid of its establishment were absolutely void.

The only act of dedication, which the defendant claims to exist, consists in a locust hedge at one time thrown

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around an entire township of which the land in controversy is a part. It is claimed that the interstices or gaps left in the hedgerows for the public to cross, constitute an act of dedication. This is not sufficient. *Graham v. Hartnett*, 10 Neb., at page 521; *Tupper v. Huson*, 1 N. W. Rep. [Wis.], 334; *City of Omaha v. Hawver*, 49 Neb., 1; *Warren v. Brown*, 31 Neb., at page 19; *Rube v. Sullivan*, 23 Neb., at pages 783, 784; *Oyler v. Ross*, 48 Neb., at page 215; *Daniels v. Chicago & N. W. R. Co.*, 35 Ia., 129; *State v. Adkins*, 42 Kan., 203; *State v. Tucker*, 36 Ia., at page 488; *State v. Green*, 41 Ia., 693; Angell, Highways [3d ed.], section 152; *Peyton v. Shaw*, 15 Ill. App., 192; *Scott v. State*, 1 Sneed [Tenn.], 629; *Stone v. Jackson*, 32 Eng. Law and Eq., 349; *Bowers v. Suffolk Mfg. Co.*, 4 Cush. [Mass.], 332; *State v. Trask*, 6 Vt., 355; *Bowman v. Wickliffe*, 15 B. Mon. [Ky.], 84; *Hall v. McLeod*, 2 Met. [Ky.], 98; *Cyr v. Madore*, 73 Me., 53; *Hall v. Mayor and Council of Baltimore*, 56 Md., 187.

Neither was the highway established by prescription or user. To acquire an easement or way on another's land there must be a use of the way for the length of time which will bar an action for the recovery of title to land, and which is under claim of right, or adverse. *Engle v. Hunt*, 50 Neb., 358; *Webster v. City of Lincoln*, 50 Neb., at page 3.

AMES, C.

This is an action to restrain the plaintiff in error, as overseer of public roads, and his successors in said office, from maintaining a public highway through and across certain lands belonging to the defendant in error. The facts, so far as their consideration appears to be requisite for this opinion, are sufficiently manifested by the findings and judgment of the district court which are as follows:

"Now on this 25th day of November, 1901, it being the first day of the regular fall term of the district court held within and for Stanton county, Nebraska, this cause having been held under advisement by the court, and coming

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on further to be heard upon the petition, answer, reply and the evidence and written arguments and brief of counsel, and the court being advised in the premises does find:

"1. That the land described in plaintiff's petition, to wit, section six, township twenty-one, range one east of the 6th P. M. in Stanton county, Nebraska, prior to the year 1885 was wild, uninclosed, uncultivated prairie land. A strip about two rods wide on the north and west line of said section six was broken in 1868, and soon thereafter a hedge was set out and the broken land on either side of said hedgerow was cultivated during the years from 1869 to 1874, when the cultivation of said land was abandoned.

"2. The court finds that in April of the year 1872, a petition praying for the survey and laying out of a public highway was filed before and presented to the board of county commissioners of Stanton county, Nebraska, and that in pursuance of said petition a commission was appointed by said board to locate a road, and thereafter a survey was made marked by a plow furrow and stakes, and along said survey a road was opened in April, 1872, across said section six and other lands. The court finds that no notice of the establishment of said road either actual or constructive was ever given to the owners of said section six, and that the proceedings by said board of county commissioners were not in compliance with the statute of Nebraska, were indefinite, irregular and void. That from and after 1872, the public traveled across said section six substantially along the line of said survey of 1872, deviating therefrom wherever and whenever encroachments made it necessary. That the public constructed a culvert, making approaches thereto across one ravine along said line of survey, which culvert was carried away by the water about eight years thereafter and was never rebuilt; that another ravine on said survey was filled with logs and dirt, which was carried away by the water about three years thereafter and was never rebuilt or repaired, and thereafter the public travel diverged eight or ten rods from the line of survey near the points where

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the said ravines crossed the same, and that the land in controversy comprised a part of a tract of land owned by Craig and Clark, consisting of an entire township, and known as the township farm.

"3. The court finds that since 1885 said section six has been owned by plaintiff, and that in 1886 plaintiff inclosed the land in controversy with a fence, placing gates across said traveled track, and the general public have opened and closed said gates and passed over said traveled tract.

"4. The court finds that defendant I. R. Postal, is and was at the commencement of this action the overseer of road district No. 19 in Stanton county, Nebraska, in which the land in controversy is situate, and has threatened to and will unless restrained by injunction herein, tear down the fences and gates and open the highway across the land in controversy.

"5. The court finds generally for the plaintiff. Deft. excepts. The court finds as a conclusion of law that no legal highway was ever laid out, established and opened across the land in controversy; that the public has never acquired a public highway across the land in controversy by adverse possession, prescription or user, the land being uncultivated, uninclosed prairie land, and no road exists by dedication, and that plaintiff is entitled to an injunction perpetually restraining defendant I. R. Postal, and his successors in office from tearing down, removing or in any manner interfering with the gates and fences of the plaintiff constructed across said line of survey as prayed in his petition.

"It is therefore ordered, adjudged and decreed by the court that the injunction be made perpetual restraining said defendant I. R. Postal, and his successors in office, from tearing down, removing or in any manner interfering with the gates and fences of the plaintiff constructed across said line of survey, in said section six."

The first contention of the plaintiff in error is that after the lapse of so long a time it will be conclusively presumed

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that the steps requisite to confer jurisdiction upon the county board to lay out and establish the road, were taken and that, therefore, the finding of the trial court that they were not taken, is necessarily unsupported by evidence. In support of this proposition counsel cites and relies upon *The City of Beatrice v. Black*, 28 Neb., 263, and *Lydick v. State*, 61 Neb., 309. Considered in connection with other opinions of this court upon the same and related questions we think that these decisions will not bear that interpretation. It was repeatedly decided by this court, at an early day, and the doctrine has never been retracted or criticised, that the petition by ten landholders and the notices prescribed by the statute, are jurisdictional steps in the absence of which the county board is powerless to take any valid action towards the establishment of a public highway. *Robinson v. Mathwick*, 5 Neb., at page 255; *State v. Otoe County*, 6 Neb., at page 133; *Doody v. Vaughn*, 7 Neb., 31; *Lesieur v. Custer County*, 61 Neb., 612.

But in a series of comparatively early cases this court adopted a view of the statute of limitations with reference to its relation to real property which, so far as the writer is aware, is peculiar to this jurisdiction, and according to which the enactment is considered neither as a statute of presumption nor as one of repose, but as one having such an effect that the open, notorious, exclusive and adverse possession of lands for the period of limitations, itself operates as conveyance or grant of the title to the occupant. It is said in *Alexander v. Wilcox*, 30 Neb., 793, that by such possession for ten years a person "acquires title" to the occupied lands. In *Ballou v. Sherwood*, 32 Neb., 666, it is held that such possession for such a time will "give (grant) perfect title thereto." In a large number of cases both earlier and later than these, the court has made use of language of substantially the same purport, so that the doctrine may now be regarded as firmly established. That the public may acquire an easement for highway purposes by adverse possession in the same manner and with the

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same effect as an individual may acquire a title by the same means, is undoubted law and is not controverted by counsel, and the proposition does not, therefore, call for discussion.

It follows from the foregoing principles that if for ten years consecutively prior to the beginning of this action, the public has been in the open, exclusive, notorious and adverse possession of the strip of ground in controversy, claiming and using it as a highway, the owner or owners of the fee must be deemed to have granted an easement in and over it for the purpose, or the public, by such possession and user, must be deemed to have acquired such an easement, however the idea may be expressed. Whether the county board ever made an attempt to lay out and establish such a road or whether, making such an attempt, they took steps indispensable to the acquisition of jurisdiction, is immaterial, except to the extent, if any, in which such an attempt, if made, may have served to characterize the possession and user by the public and to describe its territorial limits. But if, on the contrary, possession and user has not been open, notorious, exclusive and adverse, so as to be effectual as a grant or acquisition of an easement, the insufficiency of such possession can not be amended or supplied by resort to any alleged proceeding to lay out and establish a road which it is not affirmatively shown that the county board had acquired jurisdiction to prosecute. Whenever it becomes necessary to invoke the record of proceedings of an official tribunal of limited powers for the purpose of establishing a substantive right or title, it is indispensable to the success of the party relying thereupon that it be shown affirmatively that the body had acquired jurisdiction of the subject of its action. If he fails so to do, the mere lapse of time will not supply the omission. The idea that jurisdictional steps will, after a time, be presumed to have been taken, is excluded by the accepted theory of the statute of limitations. In this case it is not contended that there were any evidences of requisite jurisdictional steps or that the court erred in find-

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ing that there were none. Neither is there brought to our attention any unequivocal evidence of an intent by the owners of the land to dedicate the strip in controversy for a public road. The most that can be said in this regard, is that for considerable periods, during the time in controversy, they acquiesced in, or at least omitted to protest against or obstruct, the use of the strip by travelers. But such conduct, especially in the case of remote and unoccupied lands, falls far short of being evidence of an intent to dedicate the land to public uses. *Engle v. Hunt*, 50 Neb., 358; *The Missouri, K. & T. R. Co. v. Long*, 27 Kan., at page 696; *Brown v. Stein*, 38 Neb., 596.

There remains the question whether there was such an open, notorious, exclusive and adverse use and occupation by the public for a period of ten years as vested an easement in the plaintiff in error, in trust for the public, for the purposes of a highway. Upon this question there is a large mass of conflicting evidence, some of it direct and some of it circumstantial. It seems to us to be an issue peculiarly fitting for the district judge, who saw the witnesses and heard their testimony, and who was, doubtless, far more familiar than are we with the usages and customs of the neighborhood and the attitude of the parties, to finally try and decide upon. We think it is a case to which the settled rule of this court that findings by a trial judge upon disputed questions of fact, will not be disturbed unless manifestly wrong, is especially applicable. We should have great hesitancy, if the question was open to us, in saying that his decision is not in harmony with the weight of the evidence, but in any view we are of opinion that it is not lacking in such support thereby as under the rule mentioned, fully justifies the judgment.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

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WILLIAM A. MCCULLOUGH V. COLFAX COUNTY, NEBRASKA.

FILED MAY 20, 1903. No. 12,739.

Commissioner's opinion. Department No. 2.

1. **Animals: DAMAGE BY: PLEADING: TAXATION OF DOGS: STATUTES.**

In an action based on the provisions of section 18, article 1 of chapter 4 of the Compiled Statutes [Annotated Statutes, section 3219], against a county to recover damages alleged to have been sustained by reason of the loss of sheep killed by dogs, the plaintiff must allege that the county board, by resolution spread at large upon the records of its proceedings, imposed the proper tax, and provided the manner and conditions of payment to persons making claims against the fund created thereby.

2. **Pleading: CONDITIONS PERFORMED: STATUTE GIVING NEW REMEDY.**

In an action based purely on a statute which gives a new remedy and prescribes prerequisite conditions, facts must be alleged in the complaint showing the performance of these conditions, and it is insufficient to allege in general terms that the plaintiff has performed all the necessary conditions on his part.

ERROR from the district court for Colfax county.
Tried below before GRIMISON, J. *Affirmed.*

Everitt & Wertz, for plaintiff in error.

C. J. Phelps, contra.

BARNES, C.

This action was brought against the county of Colfax to recover certain damages alleged to have been sustained by the plaintiff on account of the loss of a number of sheep killed by dogs. The right to recover is based on sections 16 to 22 of article 1, chapter 4, of the Compiled Statutes [Annotated Statutes, sections 3217-3223]. The district court sustained a demurrer to the petition and dismissed the action and the plaintiff prosecutes error.

The allegations of the petition were in substance as follows: "That Colfax county is, and has been at all times mentioned in the petition, a corporation and political subdivision organized and existing under and by virtue of

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the laws of the state of Nebraska; that in the year 1882, and in each succeeding year thereafter up to and including the year 1899, the county had levied a tax upon the owners of each dog in the county, of less than \$5; that the tax was so levied for the purpose of constituting a special fund for the payment of all damages done by dogs within the limits of said county; that in pursuance of the said levy the assessors of the various precincts in the county in each and all of the said years assessed and listed for taxation a large number of dogs, and that the same were returned upon the assessment rolls of said county; that in the year 1883, and each succeeding year thereafter up to and including the year 1900, there was collected and paid into the county treasury of said county by the owners of dogs so taxed and assessed, large sums of money, to wit: (here followed a statement of the amount alleged to have been collected in each of the years mentioned); that said sums were paid and collected for the purpose of constituting a special fund for the payment of all damages done by dogs within the limits of said county, and for no other purpose; that these sums in each of the said years were set apart by the county treasurer as a dog tax fund for the purpose aforesaid, and a distinct record thereof was kept in the books of said treasurer; that from time to time sums of money were paid out of said special fund to parties damaged by dogs within the limits of said county, but that there remained on the 20th day of August, 1900, in the office of said treasurer, more than \$3,000 in money belonging to the said dog tax fund; that since the 20th day of August, 1900, no money has been paid by any treasurer of said county as payment for damages done by dogs, and no money has been paid from the treasury of said county for the purpose for which said special fund was created, and that there now remains in the funds of the county treasury more than \$3,000 of the moneys collected and paid as aforesaid; that the plaintiff is, and at all times herein mentioned has been a resident of said county; that on February 3, 1901, certain dogs within the limits of

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said county, and owned and harbored by residents of said county, killed seventeen wethers of the value of \$102; four lambs of the value of \$16, and chased and worried a drove of 1,834 sheep and wounded a number thereof, and by the chasing and worrying of said sheep, the said dogs caused them to tear down, trample and destroy the fence around them, and trample and destroy two tons of hay of the value of \$10; said fence being of the value of \$5; all of said property was owned by this plaintiff and was injured and destroyed within said county by said chasing and worrying of said drove of sheep by said dogs; said sheep were injured and damaged therefrom in the sum of \$150 by reason of the fright and consequent loss of appetite and fear caused by said worrying; the total damage to petitioner by reason of said chasing and worrying of said sheep, the killing thereof and the destruction of other property arising as a direct result thereof amounts to the sum of \$283; no part of said sum has been paid, and there is now due and owing to the plaintiff from the defendant the sum of \$283 with interest thereon from February 3, 1901.

"The said claim of \$283 as above set forth was duly verified, presented and filed with the county clerk of said county on the 18th day of February, 1901, and on the same day was presented to the board of county commissioners of said county at a regular session thereof, and was by them on the same day considered and disallowed. Whereupon an appeal was regularly taken to this court. Reference is hereby made to the transcript of proceedings before said board of county commissioners for a more specific statement thereof. Wherefore plaintiff prays damages," etc.

To this petition the defendant, by its county attorney, demurred for the following reason: That said petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant. The court sustained the demurrer; the plaintiff elected to stand upon his petition; his action was dismissed, and he

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now contends that the court erred in its ruling and judgment herein.

It will be observed by an examination of the petition, the substance of which is fairly quoted herein, that the plaintiff nowhere sets forth the proceedings taken by him to secure the payment of his claim by the county board; his allegations in that respect being general, to wit, that he duly presented said claim, which was disallowed. It must be further observed that he failed to plead the statute, and especially that condition of it which provides that payment from the fund described in his petition is to be made only in accordance with a regulation of the county board. The section in which this provision appears, is as follows:

“The municipal authorities of any county, city, town or township shall have authority by ordinance or resolution, entered at large on the proper journal or record of proceedings of such municipality, to impose a license tax of not more than \$5 for each dog, on the owner or harbinger of any dog or dogs, which license tax shall constitute a special fund for the payment of all damages done by dogs within the limits of the body imposing the same to be paid under such regulations as shall be provided by such ordinance or resolutions.”

It is contended by the defendant in error, first, that the law in question is unconstitutional, and second, that the failure to plead the steps taken by the plaintiff to secure the allowance of his claim by the county board, and his failure to allege that any regulation was ever adopted by the county board for the payment of such fund to the plaintiff and others who might be entitled thereto renders the petition insufficient, and that therefore the demurrer was properly sustained. It is unnecessary for us to determine the question of the constitutionality of the law on which this action is based because of the plaintiff's failure to allege sufficient facts to constitute a cause of action thereunder. We may say, however, that an examination of the authorities convinces us that an act of this nature

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may be sustained as a proper exercise of police power, by the legislature. In order to recover in this case, it was necessary for the plaintiff to plead all of the conditions precedent which would entitle him to the payment of his claim; if he has failed to do this then the demurrer was properly sustained and the judgment of the trial court should be affirmed.

This is an action based purely on the statutory provisions above mentioned, and no right exists in plaintiff's favor at the common law or under any contract relation. The rule, both at common law and under the codes, is:

"When the statute gives a new remedy and prescribes prerequisite conditions, or if an action of a certain class against certain parties be authorized only after the performance of similar conditions, the performance of these conditions, whether the right of action exists at common law, or is created by statute, must be alleged in the complaint and proved at the trial.

"Where the plaintiff wishes to avail himself of a statutory privilege or right founded upon particular facts he must state those facts in his complaint." 4 Ency. Pl. & Pr., 655.

"'Pleading the statute is stating the facts which bring the case within it; and counting on it, in the strict language of pleading, is making express reference to it by apt terms to show the source of right relied on.' *Houser v. Melcher*, 40 Mich., 185; *King v. Felton*, 63 Cal., 66."

In the case of *People v. Jackson*, 24 Cal., 630, it was held, that a complaint in an action based on a right granted by the provision of an act of the legislature relating to the location of certain lands that the allegation that said location was duly and properly made and in all respects according to the provisions of said act did not state facts sufficient to constitute a cause of action; that in pleading title to land under an act of the legislature which prescribes conditions, upon the performance of which the title may be secured, it is necessary to aver a performance of all of the acts required by the statute.

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A general averment of the performance of conditions precedent is sufficient in case of contract, but in all other cases the facts showing a performance must be specially pleaded. In an action to recover taxes, where by statute it was made a condition precedent to the maintenance of such suit that the tax collector had failed to collect the taxes by reason of his inability to find, seize or sell property belonging to the delinquent, it was held that the district attorney had no authority to commence an action to recover unpaid taxes except in cases in which the tax collector had failed to collect them for the reasons specified in the act, and that without an averment of such failure on the part of the tax collector the complaint failed to constitute a cause of action. *The People v. Holladay*, 25 Cal., 300.

In the case of *Burrell v. Haw*, 40 Cal., 373, it was held that "Before a person will be permitted to call in question the proceedings through which another has obtained a patent to public lands, he must show in himself all of the conditions necessary to enable him to pre-empt" the land, and where the complaint, as in that case, failed to show affirmatively by proper averment that the plaintiff possessed the requisite qualifications a demurrer was properly sustained.

In *Rhoda v. Alameda County*, 52 Cal., 350, it was held that in an action on a claim against the county the plaintiff must aver all of the matters required by the statute in relation to his presentation of the claim to the board of supervisors and their rejection of the same; and an averment that the claim had been duly presented and rejected was not sufficient. A general allegation in a pleading of the performance of conditions precedent is insufficient except in cases of contract, where it is authorized by statute. *Columbia Township v. Pipes*, 23 N. E. Rep. [Ind.], 750.

The statutes of Montana provide, that no account shall be allowed by a board of county commissioners unless it sets out the separate items and their nature, and is sup-

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ported by an affidavit of their truth. Under this statute it was held that a complaint which fails to allege the performance of these conditions is fatally defective. *First National Bank of Billings v. Custer County*, 17 Pac. Rep. [Mont.], 551.

In the case of *Biron v. The Board of Water Commissioners*, 41 Minn., 519, 43 N. W. Rep., 484, it was held, that under a statute prescribing specific conditions to be performed before a right of action shall accrue, a complaint is insufficient which merely alleges that the plaintiff has performed all of the acts required by the statute. "The facts showing compliance with the law should be set forth. The rule that the facts constituting a cause of action should be distinctly stated, and not left to be inferred, applied."

Before the defendant county would be authorized to pay the claim sued on, it must have adopted, by proper resolution spread at large upon the record of the proceedings of the board of commissioners, suitable regulations providing for the manner of the payment of claims made upon the fund alleged to have been created therefor. Where such fact is not alleged the presumption is that it does not exist. It further appears from the allegations of the petition that since the 20th of August, 1900, no payments have been made to any one from the fund in question; and it is not alleged that no reason exists for such non-payment. Again, the plaintiff fails to allege that the dogs causing the damages, for which he seeks to recover, were owned and harbored by persons residing in Colfax county other than himself. It has been held that the failure to make this allegation renders the petition fatally defective.

It follows that the petition was defective, and the demurrer thereto was properly sustained. For the foregoing reasons we recommend that the judgment of the district court be affirmed.

GLANVILLE and ALBERT, CO., concur.

AFFIRMED.

Morris v. Linton.

LYDIA T. MORRIS, APPELLANT, v. PHOEBE R. E. E. LINTON
ET AL., APPELLEES.

FILED MAY 20, 1903. No. 12,818.

Commissioner's opinion. Department No. 1.

1. **Mortgages:** DEFICIENCY: COVERTURE: PLEADING: BURDEN OF PROOF. Where a deficiency judgment is sought against a married woman, who denies that the note and mortgage upon which the judgment is sought were executed by her or any one legally representing her, and that she never received any consideration for the note, the burden is upon plaintiff to show facts which will create a personal liability of the defendant.
2. **Mortgages:** DEFICIENCY: COVERTURE: EVIDENCE SUFFICIENT. Evidence examined, and *held* sufficient to sustain the ruling of the trial court denying the motion for a deficiency judgment.

APPEAL from the district court for Douglas county.
Tried below before FAWCETT, J. *Affirmed.*

George B. Lake and Hamilton & Maxwell, for appellant.

John O. Yeiser and Charles B. Prichard, contra.

KIRKPATRICK, C.

This is an appeal from an order of the district court for Douglas county denying a motion for a deficiency judgment against Phoebe R. E. E. Linton and Adolphus Linton. It is disclosed by the record that at the September, 1896, term of the district court a decree of foreclosure was entered in a case brought by appellant against appellee, reported in 61 Neb., 541. After the affirmance of the decree in this court an order of sale was issued, and the property described in the decree of foreclosure was sold, leaving a deficiency of \$1,361.76. A motion was filed in the district court by appellant for a deficiency judgment against appellee herein. In resistance of this motion Mrs. Linton filed an affidavit in which she denied any liability on the note mentioned in the decree of foreclosure, "for the reason that she never executed the same, or authorized

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any one to execute the same for her, she being at the time of the alleged making and delivery of said note under coverture, being the wife of Adolphus F. Linton, whose domicile at that time, as well as up to the present time, is in Brighton, England; that she was not at the time of the giving of said note engaged in any kind of trade or business; that she never received any part of the money represented by said mortgage or note, and both said note and mortgage were wholly and entirely without consideration as to her or any one legally representing her." It is further disclosed by the record that Mrs. Linton, in her answer to the petition in the foreclosure suit, denied that she ever executed the note and mortgage in suit, and denied that she ever authorized any one to execute the note for her; and alleged that she was a married woman at the time of the execution of the mortgage, and the alleged execution of the note. To her answer a reply was filed admitting her marriage. Under this state of the pleadings the burden rests upon plaintiff to establish the liability of Mrs. Linton on the note in suit. *Grand Island Banking Co. v. Wright*, 53 Neb., 574. Upon the hearing of the motion for a deficiency judgment, no proof seems to have been offered by appellant showing or tending to show the liability of Mrs. Linton on the note. It is disclosed by the record that the alleged liability of Mr. and Mrs. Linton arose by reason of a power of attorney executed by the Lintons to one John Borland Finlay of Pennsylvania, the material portion of which is as follows:

"Know all Men by These Presents: That we, Adolphus F. Linton, and Phoebe R. E. Linton, his wife, of Brighton, England, have made, constituted and appointed, and by these presents, do make, constitute and appoint John Borland Finlay of the Commonwealth of Pennsylvania in the United States of America, our true and lawful attorney for us, or either of us, and in our, or either of our names, places and stead, to grant, bargain and sell, convey, exchange, assign, transfer, lease, mortgage or confirm any or all tracts, pieces or parcels or lots of real estate, as well

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as of coal, ore, petroleum or other valuable mineral claims, rights, interests or hereditaments, which have descended to, or been or may be acquired by or for the said Phœbe, or either of us, by gift, grant, demise, purchase, exchange or otherwise, in any of the states, districts, commonwealths or territories of the said United States of America or elsewhere."

Assuming to act under this power of attorney John B. Finlay executed the note and mortgage mentioned upon which it is sought to recover a deficiency judgment. From an inspection of the power of attorney quoted it is apparent that it furnishes no authority for the execution by the attorney in fact of a promissory note upon which either of the Lintons could be personally charged. It follows, therefore, that the order of the trial court in overruling the motion for a deficiency judgment and denying such judgment is right and should be affirmed. It is recommended that the judgment be affirmed.

HASTINGS, C., concurs.

AFFIRMED.

WILLIAM J. MCGINLEY V. JACOB BRECHTEL.

FILED MAY 20, 1903. No. 12,837.

Commissioner's opinion. Department No. 3.

Replevin: ANIMALS: SALES: CONDUCT OF VENDOR: KNOWLEDGE OF PLAINTIFF: EVIDENCE. The defendant in error gave his married daughter possession of certain domestic animals for use in her family; some months thereafter the daughter and her husband separated, after which the husband sold the animals, representing to the purchaser that he was the owner. *Held*, That defendant in error was not estopped from re-claiming the animals in the absence of proof that his son-in-law was claiming to own the property and by his acts, conduct or declarations, causing the public to believe that he was such owner and that such facts were brought to the knowledge of defendant in error prior to a sale being made.

McGinley v. Brechtel.

ERROR from the district court for Otoe county. Tried below before JESSEN, J. *Affirmed.*

W. F. Moran, for plaintiff in error.

Hayden & Wilson, contra.

DUFFIE, C.

Brechtel, the defendant in error, gave his daughter, Anna Wirthele, one cow and four brood sows to keep and use on the farm of her husband, August Wirthele. No gift of the property was made, the father still retaining title. This occurred about April, 1900, and the animals were taken to the farm of August Wirthele, some ten miles distant from Brechtel's place. Sometime in February, 1901, August Wirthele and his wife separated, she returning to her father, and some ten days after the separation August Wirthele sold the animals to McGinley, the plaintiff in error, and this action in replevin was commenced by Brechtel to recover possession of the animals or their value. Judgment went in favor of the plaintiff below and McGinley has brought the record here for review.

The only defense offered upon the trial was an estoppel based upon the following allegations of the answer: "That said August Wirthele had said property in his possession for a long time and used and controlled said property on his farm as his own and held the same out to the public as his own. That this plaintiff well knew or ought to know that said property was used, handled and controlled by said Wirthele as his own and held out as his own to the public, and that plaintiff never claimed any interest in said property until after said Wirthele had left the country."

The evidence is clear and undisputed to the effect that Brechtel never parted with his title to the property. Such being the case he is not estopped to claim his property as against a purchaser from August Wirthele, unless his acts

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and conduct in relation thereto were such as to mislead McGinley and cause him to believe that Wirthele was the true owner and that a purchase from him would give him good title. There is no evidence in the record going to show, or to lead to a suspicion even, that Brechtel knew that August Wirthele was claiming this property as his own, and until he knew this or was acquainted with facts that would lead him, as a reasonable man, to think that Wirthele was holding out to the public that he was the owner of the property, he was not called on either to take possession or to give notice of his ownership thereof. Until some act or statement of Wirthele brought to his knowledge gave him reason to believe that Wirthele was claiming the property as his own he might safely rely upon his ownership and the presumption which always obtains, that those having charge of his property would act honestly and not attempt to sell that to which they had no title. In this view of the case, and the verdict returned by the jury being the only one which the evidence would warrant, the instructions of the court become wholly immaterial and we do not think it necessary therefore to examine them.

We recommend the affirmance of the judgment.

KIRKPATRICK and POUND, CC., concur.

AFFIRMED.

MRS. DEBORAH BURTON, APPELLEE, v. MRS. CATHERINE
O'CONNOR, APPELLANT.

FILED MAY 20, 1903. No. 12,838.

Commissioner's opinion. Department No. 1.

Appeal and Error: EVIDENCE CONFLICTING: QUIETING TITLE. A finding on conflicting evidence will be adhered to on appeal, unless clearly wrong. *Faulkner v. Sims*, — Neb., —, 94 N. W. Rep., 113.

APPEAL from the district court for Douglas county.
Tried below before FAWCETT, J. *Affirmed.*

Burton v. O'Connor.

J. J. O'Connor, for appellant.

Geo. W. Cooper and John E. Reagan, contra.

HASTINGS, C.

This is an appeal from a decree quieting the title to lot 3, block 259, in the city of Omaha, in the plaintiff and cancelling a deed for the property executed by its former owner, Patrick O'Connor, in January, 1897, in favor of his wife, Catherine O'Connor, the defendant, which deed was placed of record by the latter February 13, 1900, a few days after the grantor's death.

The district court made a general finding for the plaintiff that her allegations were true. These allegations were that the defendant was the second wife of said O'Connor and married to him in 1886; that Patrick O'Connor then had this property, and two daughters, aged 15 and 17 years, both of whom survived him, but one of whom died, leaving the other as sole heir, pending this litigation; that the deceased, O'Connor, at the time of making this deed and continuously up to his death was old and infirm in both mind and body and addicted to the excessive use of intoxicating liquors; that he was encouraged in such use of intoxicating liquors by the defendant and ever since the date of the deed, and for a long time before, was completely under her control; that the daughters were driven away from home immediately after the father's marriage with defendant and with design to deprive the daughters of their interest in the property conveyed, and by the use of undue influence, and by procuring her husband's intoxication and without consideration, she procured the execution of the deed; that it was not placed of record until after the death of the grantor, and its existence, and the fact of the death of the father, were both fraudulently concealed from the daughters, and that the deed was procured with the intent to defraud the latter of their inheritance from their father.

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The answer denies the allegations of fraud, undue influence and drunkenness, on the part of Patrick O'Connor and of encouraging it on the part of the defendant, and alleges that about the date of the deed defendant gave her husband \$800 as a part payment of its consideration, and claims the property is worth less than \$2,000, and that she has occupied it as a home with her husband and since his death.

The only objection urged against the decree is that of insufficient evidence. An examination of the record discloses that a Mrs. Bowen, who at the time of making the deed was a tenant in one of the houses on the property, testified that at that date, and for some time prior and after, Patrick O'Connor was in a very drunken condition; that he was kept in that condition by his wife; that he was lamenting the fact that he had conveyed all his property; that defendant told the witness that she got him "full" and kept him "full" until she got the deed from him and that she should give him some more beer and he would be all right. There is considerable evidence by neighbors and acquaintances to the drunken habits of Patrick O'Connor and the ascendancy which his wife maintained over him. On the other hand there is testimony by his attorney, O'Connor, and by other men, who saw him occasionally away from home and upon business, that they never saw him under the influence of liquor, and that he was of a resolute and obstinate temper and not to be controlled. It is also testified by his attorney that just before his death he asked the latter, in whose possession the deed still was, if it was all right, and was advised that it was and that the making of no will was necessary to secure the property to his wife.

The finding is one made upon conflicting testimony and we are by no means prepared to say that the trial judge was wrong in finding that this deed was a product of undue influence and the fraudulent employment of the agency of alcohol, notwithstanding the testimony that at the time of the execution of the deed, at whose making the wife was

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present, the grantor was sober and was not under visible coercion. The evidence of the wife is that she let her husband have a sum of money, what amount does not appear, for the payment of taxes, for the building of one of these houses shortly before the making of this deed, and it also appears that, some time before the deed was made, a bank deposit of about \$1,500, made by Patrick O'Connor in their joint names, was assigned by him to his wife. There seems to be no denial in the record that the daughters were driven away from home by the influence of the wife immediately after the second marriage and their father kept from communicating with them. The evidence produced on behalf of the plaintiff, if believed, is ample to support the decree. It is denied in a great part by the defendant, and some evidence is introduced by business acquaintances that goes to indicate that the testimony as to the deceased's drunken habits, and the extent of his wife's control over him, are exaggerated, but we are entirely unable to say that the action of the trial court is clearly wrong or even that it is against the preponderance of the evidence.

It is recommended that the decree of the trial court be affirmed.

OLDHAM and AMES, CC., concur.

AFFIRMED.

DAVID ADLER & SONS CLOTHING COMPANY, APPELLEES, v.
MARIA HELLMAN, APPELLANT, ET AL.

FILED MAY 20, 1903. Nos. 12,975, 12,976.

Commissioner's opinion. Department No. 1.

1. **Mortgages: FORECLOSURE: APPRAISAL: VALUATION: FRAUD.** Testimony to show that the valuation of real property offered at judicial sale was fixed too low by the appraisers where fraud or collusion does not appear, will not avail to set aside the appraisal or a sale under it.

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2. **Mortgages: FORECLOSURE: APPRAISAL: QUALIFICATION OF APPRAISERS: RECEIVER.** The mere fact that the two appraisers have given evidence on plaintiff's behalf as to the value of the property at the trial of the action in which the sale is had and in a hearing as to the appointment of a receiver for it, does not disqualify them to act as appraisers.
3. **Mortgages: FORECLOSURE: APPRAISAL: DEDUCTION OF VOID TAXES.** The fact that city taxes still standing on the treasurer's books as a lien on the property were certified by him to the appraisers and deducted from the value of plaintiff's interest, will not avoid the appraisement though in an action between other parties some taxes of the same levy have been held void.
4. **Mortgages: FORECLOSURE: SURPLUS APPLIED TO TAXES BY RECEIVER.** Where plaintiff has bid in the property involved in a suit at two-thirds of its appraised value, and at a price sufficient to pay the decree, it has no right after the confirmation to have money in the hands of the receiver applied in payment of taxes on the property.

APPEAL from the district court for Douglas county. Tried below before DICKINSON, J. *Affirmed upon payment of taxes.*

Connell & Ives, for appellant.

Montgomery & Hall, contra.

HASTINGS, C.

Two cases were originally presented here. The first, general number 12,975, was an appeal from the order of confirmation which appears by the record to have been made on July 3, 1902, and to have been entered of record on the 5th, confirming the sale of certain real estate in Omaha under a decree obtained by the plaintiffs in 1895 and subsequently affirmed by this court. The other case, general number 12,976, was an appeal from an order allowing and confirming a receiver's final report in the same action. It was objected to this report that it showed that on the 12th day of July, seven days after the entry and nine days subsequent to the making of the order of confirmation, a considerable amount of taxes on the property sold was paid by the receiver. It is objected that this

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payment, having been made subsequently to the confirmation of the sale, went to the sole benefit of the plaintiff and should not have been allowed on the receiver's final settlement. The two cases have been consolidated by the order of the court and are to be considered together, the latter as merely ancillary to the appeal in the first.

The objections to the confirmation of the sale as shown by the record are: 1st. That the valuation of the property at \$18,000 is grossly inadequate. 2d. That since the making of the appraisement the real estate has enhanced in value and a considerable amount has been expended in its improvement. 3d. That its fair market value greatly exceeds its appraisal. 4th and 5th. That W. H. Green and Chas. F. Harrison, appraisers, were not disinterested freeholders. 6th. That the sum of \$1,917.61 for city taxes was wrongfully and improperly deducted from the value of the premises. 7th. That \$822.90 for county taxes were wrongfully deducted. 8th. That \$1,244.37, as per district clerk's certificate, were improperly and unlawfully deducted. 9th. That Mrs. Hellman's interest was greatly more than the sum named, to wit, \$14,014.92. 10th. That so long a time intervened between the appraisal and the sale that a new appraisement should be made.

With regard to the first three of these objections, it has been often enough held that a valuation which seems to the witnesses too low will not be set aside simply on that ground unless the valuation is so grossly inadequate as of itself to indicate fraud. It is not claimed with much confidence that such is the case in this instance, and we do not so find. Objections Nos. 4 and 5, as to the incompetency of the appraisers, are based upon the fact that they were witnesses at the trial of the original case and made affidavits in support of the plaintiff's application for a receiver. One of the issues at the trial was the value of this and other property and the question on the appointment of the receiver was whether or not there was danger of the property proving insufficient to pay plain-

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tiff's lien. It would not seem that the mere fact that both of these parties had given testimony on these two occasions would necessarily detract in any way from their competency to serve as disinterested freeholders in appraising property.

The 6th objection, the deduction of the city taxes from the value of the property, is based upon the claim that in an action for injunction and apportionment of taxes brought by another party, these same taxes levied upon another portion of the same block had been declared void. The other alleged errors are not referred to in the brief and will not be considered. As to the injunction case dealing with these taxes, it seems to be conceded that Mrs. Hellman, in a contest with a tax purchaser who sought to have a lien upon her property declared for a part of this tax, was protected by an injunction. Neither the county, nor plaintiff here, was a party to that foreclosure and it is not claimed, apparently, that any of these taxes in question were wiped off, only that these must be as void as those were. It is not claimed that these taxes do not appear of record in the treasurer's office as a lien. The treasurer's certificate to the sheriff is not claimed to have been untrue. It can hardly be held erroneous for the appraisers to act upon it.

This is the third appraisement of the property in this action. The doctrine seems to be that an appraisement is to be treated as a summary proceeding to fix a minimum price on property to be sold, and that only fraud or irregularities taking away the power of the appraisers to act in it, or in some way affecting the substantial rights of a defendant, will vitiate it. This does not appear here so far as the appraisement alone is concerned.

As to the other complaint, we have carefully considered the situation and do not see on what ground plaintiff can claim to retain the title to this property, and also have the receiver's money applied upon these taxes. The confirmation order was entered on July 5, 1902; on the 12th day of the same month the receiver, by advice of the plaintiff's

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attorney, paid taxes to the amount of \$695.16, and on the hearing of the final report this was allowed by the court as a proper payment. Evidently this payment went entirely to the benefit of the plaintiff. It had bought the property and it had bid two-thirds of the appraised value by necessity. In doing so it had overpaid its own claim and costs by a few dollars. Clearly, if a stranger to the action had bought the property he would have had no claim after the sale, to say nothing of the confirmation, to have the receiver ordered to pay these taxes. Plaintiff would have had neither interest nor right in the money, for its decree would have been paid. Can plaintiff be allowed to have in this action more than the property it bought and the payment of its decree? Purchasers at execution sale of real estate are under the rule of *caveat emptor*, and are subject to all then existing liens. *Norton v. Nebraska Loan & Trust Co.*, 35 Neb., 466, 40 Neb., 394.

It is true that one of the defendant's objections to this sale is that it was made two years and more ago. These taxes accrued since and were never deducted from the appraisal. Ordinarily, whoever gets the current income of property should pay current taxes, but in this case plaintiff had purchased the property with taxes unpaid and bid enough to satisfy its decree and leave something. To be sure the receiver remained in possession and collected rent till August 1. He was holding under an order of appointment which directed him to pay the delinquent taxes and these taxes were delinquent when he paid them; \$344.85 were delinquent from the preceding year. It does not appear when the funds from which the payment was made came into the receiver's hands, except about \$100 which were received July 10. The receiver says he did not know anything about the sale, and while he had been previously told by plaintiff's attorney to pay the taxes as soon as he had money to do it, he acted only on the order of the court to pay delinquent taxes. The order appointing the receiver in May, 1901, directed him to collect rents and apply funds, 1st, to necessary and usual repairs; 2d,

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to insurance; 3d, to delinquent taxes. As before suggested, whatever claim on this fund plaintiff had after the sale was in its capacity of purchaser. Plaintiff's bid paid its decree and created a small surplus with the money collected by the receiver. As purchaser, under the rule of *caveat emptor*, could it claim any application of funds in this action to which it was not, as purchaser, a party at all? Could plaintiff, as plaintiff, insist on any application of these funds after its decree was paid? Could it, as purchaser, after buying subject to these taxes and taking confirmation of this sale with them still unpaid, claim a right to have the fund so applied? It is true that all but \$203.01 seems to have been delinquent before the sale and all of it before the confirmation. It would seem, however, that plaintiff can not claim a right under this order to have the taxes paid after the sale and that if it desires to hold this property it should refund the taxes paid by the receiver since the confirmation. Of course, if the sale is set aside there can no longer be any objection to the payment of taxes.

The argument that equity will consider that done which ought to have been done, that these taxes ought to have been paid before the sale, and although it was done afterwards, the transaction should be treated as though it had been done before, does not seem sufficient to do away with the doctrine that, in buying the property, plaintiff took it as it was. There might have been other bidders had it been known that this \$695.16 would go into the property.

It is recommended that the order of confirmation be affirmed if plaintiff shall pay into court, for the benefit of Mrs. Hellman, within forty days, the amount of taxes paid by the receiver on July 12, and in default of such payment, that sale and appraisement be set aside and a new sale and appraisement be ordered.

KIRKPATRICK and LOBINGIER, CC., concur.

The order of confirmation is affirmed if the plaintiff shall pay into court, for the benefit of Mrs. Hellman,

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within forty days, the amount of taxes paid by the receiver on July 12, and in default of such payment, that sale and appraisement be set aside and a new sale and appraisement ordered.

REVERSED WITH DIRECTIONS.

OMAHA SAVINGS BANK, APPELLANT, ET AL. V. THE CITY OF
OMAHA, APPELLEE.

FILED JUNE 3, 1903. No. 12,159.

Commissioner's opinion. Department No. 1.

Mortgages: FORECLOSURE: DEDUCTION OF VOID TAX LIEN: INJUNCTION AGAINST COLLECTION OF TAX: ESTOPPEL. While a purchaser at an execution sale takes the real interest of the debtor, and is not necessarily concluded by the appraisement, yet, where the amount of a tax lien, which has not been mentioned or included in the decree, has been deducted from the gross appraised value of the property by the appraisers, and the purchase is made for less than two-thirds of the gross appraised value, upon the assumption that such taxes are a valid lien, the purchaser taking advantage of the deduction thereof will be presumed to have undertaken to pay such taxes, and will not be heard to deny their validity in an equitable proceeding seeking to enjoin their collection.

APPEAL from the district court for Douglas county.
Tried below before FAWCETT, J. *Affirmed.*

Frank Heller, with William A. Saunders, Franklin J. Griffin and Henry W. Pennock, of counsel, for appellant.

An estoppel is an affirmative defense, must be specially pleaded, and the burden of proof is on the defendant to establish by competent evidence every fact necessary to create an estoppel. *Nebraska Mortgage Loan Co. v. Van Kloster*, 42 Neb., 746; *Gregory v. Kenyon*, 34 Neb., 640; *Scroggin v. Johnston*, 45 Neb., 714; *Erickson v. First National Bank*, 44 Neb., 622; *Union State Bank v. Hutton*, 62 Neb., 664.

If the conduct of the bank created an estoppel it comes nearer being classifiable as an equitable estoppel or estoppel *in pais* than any other. The necessary elements of an estoppel by conduct are:

1. There must have been misrepresentation or concealment of material facts.

Everything that was done touching this sale is a matter of sale open to inspection. There was no concealment, nor were there misrepresentations. In the absence of this element no estoppel can arise. *Henshaw v. Bissell*, 85 U. S., 255; *Cain v. Boller*, 41 Neb., 721.

2. If there was any misrepresentation it must have been made with knowledge of the facts.

The bank had no knowledge that the assessments were void, and there could be no estoppel on the ground that it had. *Nash v. Baker*, 40 Neb., 294; *New Orleans v. United States*, 10 Pet. [U. S.], at page 734; *Lewis v. San Antonio*, 7 Tex., 288; *Newman v. Edwards*, 34 Pa. St., 32; *Young v. Young*, 80 Tenn., 335; *Bybee v. Oregon & C. R. Co.*, 139 U. S., 663.

3. The party to whom it was made must have been ignorant of the truth of the matter.

If both parties are equally cognizant of the facts and one party has acted under a mistaken idea of the law, the other party can not say that he has been deceived thereby and therefore invoke an estoppel in his favor. *Holcomb v. Boynton*, 151 Ill., 294; *Robbins v. Potter*, 98 Mass., 532; *Mueller v. Kaessmann*, 84 Mo., 318; *Stone v. Engstrom*, 19 R. I., 201.

4. It must have been made with the intention that the other party should act on it.

Estoppels are founded on intention and can not be extended to objects and purposes which the parties can not be reasonably supposed to have had in view. *Needles v. Hanifan*, 11 Ill. App., 303. Acts and declarations, or silence, to create an estoppel *in pais* must be willfully intended to lead the party setting up the estoppel to act upon them. *Burke v. Utah National Bank*, 47 Neb., 247;

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McCaskill v. Connecticut Savings Bank, 60 Conn., 300; *Winslow v. Cooper*, 104 Ill., 235; *Plumer v. Lord*, 91 Mass., 455; *Califf v. Hillhouse*, 3 Minn., 217; *Otis v. Sill*, 8 Barb. [N. Y.], 102; *Gardner v. Pierce*, 22 Nev., 146; *Daugherty v. Yates*, 13 Tex. Civ. App., 646.

5. The other party must have been induced to act on it. *Union State Bank v. Hutton*, 62 Neb., 664; *Lee v. Lake*, 14 Mich., 12; *Fletcher v. Holmes*, 25 Ind., at page 469; *McCune v. McMichael*, 29 Ga., 312; *Ferris v. Coover*, 10 Cal., 589, 632; *Mutual Life Ins. Co. v. Norris*, 31 N. J. Eq., 583.

6. The other party must have been prejudiced by such act. Without this element there can be no equitable estoppel. *Union State Bank v. Hutton*, 62 Neb., 664; *Carter v. Darby*, 15 Ala., 696; *Biddle Boggs v. The Merced Mining Co.*, 14 Cal., at pages 366-373; *Fawcett v. The New Haven Organ Co.*, 47 Conn., 242; *Birch v. Hutchings*, 144 Mass., 561; *DeMill v. Moffatt*, 49 Mich., at page 131; *Whitacre v. Culver*, 8 Minn., 103; *The City of St. Louis v. Wiggins Ferry Co.*, 88 Mo., 615; *Garlinghouse v. Whitwell*, 51 Barb. [N. Y.], 208; *Hill v. Epley*, 31 Pa. St., 331; *McGregor v. Sima*, 12 Tex. Civ. App., 105; *Guichard v. Brande*, 57 Wis., 534.

Every estoppel must be reciprocal, that is, must bind both parties. *Bolling v. The Mayor of Petersburg*, 3 Rand. [Va.], at page 575; *The Welland Canal Co. v. Hathaway*, 8 Wend. [N. Y.], 480; *Wright v. Douglass*, 10 Barb. [N. Y.], 97; *The Cohoes Co. v. Goss*, 13 Barb. [N. Y.], 137; *Smith v. Knowles*, 2 Grant's Cases [Pa.], 413; *Lewis v. Castleman*, 27 Tex., 407.

To constitute an estoppel *in pais*, the party in whose favor the estoppel operates must have altered his position in reliance upon the conduct of the other party. *Lingonner v. Ambler*, 44 Neb., 316; *Union State Bank v. Hutton*, 62 Neb., 664; *Carter v. Darby*, 15 Ala., 696; *Franklin v. Meyer*, 36 Ark., 96; *Brown v. Wheeler*, 17 Conn., 344; *Young v. Foute*, 43 Ill., 33; *Stringer v. The Northwestern Mutual Life Ins. Co.*, 82 Ind., 100; *Wood v. Pennell*, 51 Me., 52; *Homer v. Grosholz & Coquentin*,

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38 Md., 520; *Plumer v. Lord*, 91 Mass., 455; *Whitacre v. Culver*, 8 Minn., 103; *Spurlock v. Sproule*, 72 Mo., 503; *Blair v. Wait*, 69 N. Y., 113; *Wheelock v. Hardwick*, 48 Vt., 19.

A wrong-doer can not invoke estoppel. *Village of Wayzata v. Great N. R. Co.*, 46 Minn., 505; *Stanford v. Lyon*, 37 N. J. Eq., 94; *Pierrepoint v. Barnard*, 5 Barb. [N. Y.], 364; *Calfee v. Burgess*, 3 W. Va., 274.

Estoppel can not be predicated upon a *nudum pactum*. *Saxton v. Dodge*, 57 Barb. [N. Y.], 84. One not a party to a conveyance can not insist that the grantee therein is estopped to deny the operation of a stipulation in the instrument when such third party has not himself been misled or deceived by the stipulation. *McKinney v. Lanning*, 139 Ind., 170; *Allen v. Allen*, 45 Pa. St., 468.

The following cases support the doctrine that a purchaser at an execution sale may be estopped to question the validity of prior incumbrances: *Patterson v. De La Roubie*, 75 U. S., 292; *Gassenhimer v. Molton*, 80 Ala., 521; *Waterman v. Curtis*, 26 Conn., 241; *The Delaware & Hudson Canal Co. v. Bonnell*, 46 Conn., 9; *Thomas v. McKay*, 68 Ky., 475; *Atkins v. Emison*, 73 Ky., 9; *Russell v. Dudley*, 44 Mass., 147; *Messmore v. Huggard*, 46 Mich., 558; *Flanders v. Jones*, 30 N. H., 154; *Horton v. Davis*, 26 N. Y., 495; *Koch v. Losch*, 31 Neb., 625; *Farmers Loan & Trust Co. v. Schwenk*, 54 Neb., 657; *Nye & Schneider Co. v. Fahrenholz*, 49 Neb., 276; *Arlington Mill & Elevator Co. v. Yates*, 57 Neb., 286; *Battelle v. McIntosh*, 62 Neb., 647.

The following cases hold that a purchaser at an execution sale may not be estopped to question the validity of prior incumbrances. *Stebbins v. Miller*, 94 Mass., 591; *Carpenter v. Simmons*, 28 How. Pr. [N. Y.], at page 18; *Porter v. Parmley*, 52 N. Y., 185; *Wagner v. Jones*, 7 Daly [N. Y.], 375.

A legal or equitable owner, or a mere incumbrancer, may contest special assessments. *The City of Chicago v. Rosenfield*, 24 Ill., 495.

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Cases involving estoppels where the transactions were absolutely void. *Uhlig v. Garrison*, 2 Dak., 71; *Dupas v. Wassell*, 1 Dill. [U. S.], 213; *Auditor General v. Board of Supervisors of Midland County*, 84 Mich., 121; *Holcomb v. Boynton*, 151 Ill., 294; *Mutual Life Ins. Co. v. Norris*, 31 N. J. Eq., 583; *Standard Furniture Co. v. Van Alstine*, 22 Wash., 670.

If the act undertaken was in and of itself *ultra vires* of the corporation, no act of the body can have the effect to estop it to allege its want of power to do what was undertaken. Bigelow, *Estoppel* [5th ed.], 467, 476; *State v. Murphy*, 134 Mo., 548; *Whceler v. City of Poplar Bluff*, 149 Mo., 36; *Thomas v. Railroad Co.*, 101 U. S., 71, 86; *Scovill v. Thayer*, 105 U. S., 143; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S., 290, 317; *Winters v. Armstrong*, 37 Fed. Rep., at pages 515-521; *Union Depot Co. v. City of St. Louis*, 76 Mo., 393; *Stace & Worth's Case*, L. R. 4 Ch. D. [Eng.], 682, note.

James H. Adams and Charles E. Morgan, contra.

There are four well settled doctrines of this court which absolutely determine the law of this case:

1. A purchaser at a judicial sale is charged with notice of the proceedings leading to the sale, including the appraisement.

2. Appraisers in judicial sales act judicially and parties, including the purchaser, are, in collateral proceedings, bound by the appraisement.

3. The appraisement, unless set aside, becomes conclusive and a portion of the terms of the sale.

4. A purchase of property at a judicial sale, at which certain apparent liens have been duly certified and deducted in the appraisement, is a purchase subject to such liens, and the purchaser will be estopped from questioning their validity in subsequent proceedings.

These rules are laid down in *Nye & Schneider Co. v. Fahrenholz*, 49 Neb., at pages 278, 279. This case and others show that the estoppel was not one *in pais*.

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The rule of estoppel by appraisal in foreclosure proceedings is settled by a long line of decisions in this state. It was laid down in the case of *Koch v. Losch*, 31 Neb., 625; was affirmed in the case of *Viergutz v. Aultman, Miller & Co.*, 46 Neb., 141; IRVINE, C., announced it as a settled rule in *Nye & Schneider Co. v. Fahrenholz*, 49 Neb., at page 278; it has been followed in the cases of *Norfolk State Bank v. Schwenk*, 51 Neb., 146; *Farmers Loan & Trust Co. v. Schwenk*, 54 Neb., 657; *Arlington Mill & Elevator Co. v. Yates*, 57 Neb., 286; *Battelle v. McIntosh*, 62 Neb., 647; *Curtis v. Osborne & Co.*, 63 Neb., 837; *Peterborough Savings Bank v. Pierce*, 54 Neb., at page 721, concurring opinion by IRVINE, C. These cases sustain the rule that one who purchases subject to a lien can not question its existence or validity in subsequent proceedings.

KIRKPATRICK, C.

This is a suit brought by the Omaha Savings Bank and John H. Caulfield against the city of Omaha to enjoin the collection of certain special assessments, and to cancel the same of record, for the reason that they are void. The petition alleges ownership on the part of the bank and Caulfield of certain separate tracts of land in the city of Omaha; that certain special assessments had been made thereon and spread upon the records, which were clouds upon the title; that such special assessments were null and void for many reasons which were specifically pleaded. The answer of the city admitted the formation of the various paving districts, the passage of the several ordinances for the paving of the streets, the setting of curbs and guttering; admitted the levy of the taxes as alleged in the petition; and, among other things, pleaded that the bank purchased the property owned by it at sheriff's sale; that it procured certificates of liens from the treasurer's office, showing the existence of certain general taxes and special assessments, the collection of which are sought to be enjoined in this action; that such

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special taxes and assessments were at the instance and request of appellants deducted by the sheriff from the total appraised value of the lots as valid liens thereon, and that the bank took advantage of the deduction of the liens in the purchase of the premises, and did not bid two-thirds of the gross appraised value; and that by so doing it treated said taxes as valid and subsisting liens against the property, and by such proceedings became obligated to pay the taxes, and was estopped in this proceeding to question the validity of such general and special taxes. To this answer of the city was filed for reply a general denial. The trial court found that the special taxes and assessments mentioned in the petition were void for want of jurisdiction in the city council to make the levy; that John H. Caulfield was entitled to a perpetual injunction restraining the city from attempting to collect such taxes upon the property owned by him, and removed the cloud cast by the taxes upon his title; that the Omaha Savings Bank had purchased the property owned by it at sheriff's sale; that the sheriff had procured from the treasurer's office a certificate of liens showing the existence of the taxes in question, and that they were liens upon the property involved in appellant's decree of foreclosure; that appellant bank had not bid two-thirds of the appraised value of the property after the deduction of said taxes as valid liens against the property, and by reason of such action the bank was estopped to question the validity of the taxes, and the court thereupon entered a decree dismissing the petition of appellant bank for want of equity. From this decree the bank brings the cause to this court upon appeal.

It is disclosed by the record that the gross appraised value of the property involved as made by the sheriff and appraisers was \$6,200. From this sum was deducted in tax liens, part of which was for county and state taxes, regarding which no complaint is made, the sum of \$1,344.29, leaving a net appraisement of \$4,855.71. Two-thirds of this sum would be \$3,237.14. The amount

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bid by appellant bank at the sheriff's sale was \$3,239, being \$1.86 more than two-thirds of the net appraisement. It is thus apparent that appellant bank, in the purchase of the property, took advantage of the deduction of the full amount of the taxes, including the special assessments complained of. By this conduct it acknowledged the validity of the special assessments. In effect, it is said to the owner of the property that the taxes were a valid lien upon the premises and that it would ultimately be obliged to pay them to protect its title, and would accordingly retain of the purchase price a sufficient sum to pay them. It did retain this money. The assessments were at least *prima facie* valid. The owner was at least morally bound to pay them. The purchase in this manner in effect amounts to a contract with the owner that the purchaser would pay the taxes. Taking advantage of the deduction of the taxes, regarding them as valid, as the record discloses the bank did, raises a presumption, in the absence of a showing to the contrary, that the taxes were valid, and that the bank agreed, by implication at least, with the owner of the premises to pay such taxes. The owner had a right to rely upon this implied agreement, and we are of opinion that the city likewise had a right to rely upon it. While a purchaser at an execution sale takes the interest which the debtor actually has, and is not necessarily concluded by the appraisement, yet where taxes, which have not been mentioned in the decree, have been deducted from the gross appraised value of the property sold on execution, the purchaser taking advantage thereof, he will ordinarily be presumed, in the absence of a showing to the contrary, to have agreed with the owner of the property to pay such taxes. Accordingly, appellant bank in this case will not be permitted to enjoin the collection of the taxes. To hold otherwise would be to permit appellant to perpetrate a fraud upon the owner and upon the city as well. If, upon discovery of the invalidity of these taxes, appellant had gone to the owner and tendered to him the amount it retained from the pur-

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chase price on the assumption of the validity of the taxes, it would be in a position to come into a court of equity and insist upon its right to escape payment thereof, and have the cloud cast thereby removed, and this would no doubt be done. Appellant bank's bill wholly fails to show any equity in its favor, and we are of opinion that the decree dismissing its bill is right.

It is therefore recommended that the judgment of the trial court be affirmed.

HASTINGS, C., concurs.

AFFIRMED.

SULLIVAN, C. J., dissenting.

I do not agree either to the reasoning or the decision of the commissioner. My views upon the question considered are fully stated in *Hart v. Beardsley*, 67 Neb., 145, 93 N. W. Rep., 423.

WILLIAM O'BRIEN V. HEINRICH KLUEVER ET AL.

FILED JUNE 3, 1903. No. 12,187.

Commissioner's opinion. Department No. 1.

1. **Trial: To COURT: EVIDENCE: APPEAL AND ERROR.** In a cause tried to a court, a judgment will not be reversed for admission of incompetent evidence when the judgment is sustained by sufficient competent evidence.
2. **Mortgages: FORECLOSURE: AMOUNTS AND PRIORITIES OF LIENS FIXED: TITLE OF PURCHASER.** Where a decree of foreclosure on behalf of plaintiff and various cross-petitioners fixed the respective amounts and priorities of a large number of liens, a purchaser, on sale and confirmation of such decree, takes title to the land involved divested of the liens of all parties to the suit, although the money realized on the sale may be insufficient to satisfy the junior liens.
3. **Mortgages: FORECLOSURE: EVIDENCE SUFFICIENT.** Evidence examined, and *held* sufficient to sustain the findings and judgment of the trial court.

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ERROR from the district court for Platte county. Tried below before HOLLENBECK, J. *Affirmed.*

Wm. O'Brien, for plaintiff in error.

Reeder & Hobart and McAllister & Cornelius, contra.

KIRKPATRICK, C.

This is a suit brought by Heinrich Kluever, one of the defendants in error, in the district court for Platte county, against William O'Brien, plaintiff in error, J. C. Byrnes, sheriff of Platte county, and Henry Gering, who are made defendants in error in this proceeding because they refused to join with O'Brien as plaintiffs in error. The suit was brought to remove a cloud upon the title to certain land owned by and in the possession of Kluever, caused by sheriff's deed executed by Byrnes to Henry Gering, and a deed made by Gering and wife to William O'Brien, and to quiet the title to the premises in Kluever. Answers and cross-petitions were filed by Gering, Byrnes and O'Brien, setting up title in O'Brien, and asking to have the same quieted in him, and, in addition, the answer of Gering disclaimed any interest in the premises. To these answers and cross-petitions a general denial was filed for reply. Trial was had resulting in a finding and judgment quieting title in Kluever, removing the cloud upon his title, and dismissing the cross-petitions of O'Brien, Byrnes and Gering for want of equity.

It is conceded by all parties that in 1890 title to the premises was in Michael Hogan, both parties claiming title through him. Some time prior to October 9, 1895, Albert Stenger commenced a foreclosure proceeding on a mortgage upon this land, making all parties in interest defendants except one Ira Davenport, who was the holder of a first mortgage thereon. On October 9, 1895, a decree of foreclosure was entered, giving Ernst & Schwarz a first lien for \$89.68; the Commercial Bank of Columbus a second lien for \$207.25; Albert Stenger, plaintiff, who

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held a mortgage, a third lien for \$604.35; F. H. Rusche a fourth lien for \$53.87; the Home Fire Insurance Company of New York a fifth lien for \$37.05, and J. H. Galley, who also held a mortgage, a sixth lien in the sum of \$444.16. In this decree the court further found that Michael Hogan was dead, and that prior to his death he and his wife had conveyed the premises to Stephen Hogan, who was the owner at the date of the decree; that at the time of the sale to Stephen Hogan, the land was the homestead of Michael Hogan and his wife, and was of the value of \$4,800, and that the liens allowed against said land aggregated the sum of \$3,018; that the judgment of Patrick Powers was not a lien; that the judgment of Greisen Brothers was not a lien, and by decree the court removed the cloud upon the title created by the last mentioned judgments. Subsequently, and on December 10, 1896, Ira Davenport began a foreclosure on his first mortgage, making all parties in interest, including all parties to the Stenger decree, parties defendant; and on February 6, 1897, obtained a decree establishing his mortgage as a first lien upon the property in the sum of \$2,283.50. The cause was thereupon continued as to the issues between the cross-petitioners and defendants, and on June 12, 1897, the cause again came on for hearing, and the court affirmed and re-established the decree in the Stenger case in all respects as to the several parties to that proceeding, preserving the priorities as therein fixed, except that the liens of all parties were made subject to the mortgage lien in favor of Davenport; and in addition the court found that Patrick Powers had a lien for his judgment in the sum of \$535, making the lien of Powers inferior and subject to the lien of Davenport, and the cross-petitioners, Albert Stenger, the Commercial Bank of Columbus, Ernst & Schwarz, F. H. Rusche and J. H. Galley, with decree of foreclosure and order of sale. On March 13, 1897, the property in controversy was sold by the sheriff under the Stenger decree to Albert Stenger for \$1,335; and on March 27, 1897, the sale was confirmed, and on June 17,

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1898, sheriff's deed issued to Stenger. On June 18, 1898, Stenger conveyed the property by deed to the Commercial Bank of Columbus, and on December 1, 1898, the bank conveyed the property to H. Kluever, defendant in error herein. The record is silent as to the application of the money realized on the sheriff's sale hereinbefore referred to. On December 24, 1897, an order of sale was issued on the Davenport decree of February, 1897, and on January 31, 1898, the property was sold to the Commercial Bank of Columbus for \$3,200. The purchaser failing to pay the purchase price, the sale was on February 9, 1898, vacated and set aside. On March 8, 1898, Davenport made an assignment of his decree to the Commercial Bank, which had theretofore succeeded to Stenger's title under the sheriff's deed and the interest acquired by the bank, under its assignment, in the Davenport mortgage and decree undoubtedly merged in its deed title obtained from Stenger.

Subsequently, and at a date not disclosed by the record, a second order of sale was issued on the decree of June 12, 1897, and on February 19, 1900, the sheriff sold the property under this order of sale to Henry Gering for \$1,375, and on March 1, 1900, this sale was confirmed. On the day following the sheriff issued his deed to Henry Gering, and on March 17 Henry Gering and wife conveyed the property to William O'Brien.

It is claimed by defendant in error that the judgment is erroneous for two reasons: first, that the court erred in receiving in evidence the records of the county clerk of Platte county, showing deeds of record in his office without producing or satisfactorily accounting for the loss of the original deeds; second, that, leaving out of consideration the incompetent evidence, upon the whole record it appears that plaintiff in error was entitled to judgment.

Regarding the first contention, it may be said that as this cause was tried to the court, the judgment being presented for review by proceedings in error, the one question requiring consideration is whether there is suffi-

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cient competent evidence under the pleadings to sustain the judgment. Kluever, in his petition, alleged that he was the owner in fee simple and in possession of the premises and had owned and been in possession thereof for more than a year prior to the filing of his petition. O'Brien's answer consisted, first, of a general denial, and second of a paragraph in the following words:

"Said defendant, William O'Brien, for further answer to said petition, and for the purpose of obtaining affirmative relief, alleges that whatsoever claim or title said Henry Kluever has or claims in the premises described in plaintiff's petition was derived through and from Albert Stenger, and the Commercial Bank of Columbus, defendants in the case of Ira Davenport, plaintiff, against Sarah Hogan and others, defendants."

The answer then sets up the various claims of the parties. In our view, this answer admits the title and ownership of Kluever so far as he derived his title from Stenger and the Commercial Bank. Disregarding incompetent evidence in the record, the journal entries of the district court for Platte county show a decree of foreclosure in favor of Stenger and the Commercial Bank of Columbus, the issuance of an order of sale, the sale of the property to Albert Stenger, and confirmation thereof. There is also shown an assignment by Ira Davenport of the decree of foreclosure and the lien of the first mortgage to the Commercial Bank, thus uniting in Kluever all the rights of Stenger under his purchase, all the rights of the bank, and all the rights of Davenport under the first mortgage.

It is pleaded in the answer and cross-petition of O'Brien that he purchased and procured an assignment to him of the junior liens of H. F. Rusche, J. H. Galley and Patrick Powers. This allegation is denied by the reply, and no proof is offered to support it, but it is disclosed by the record that after the sale and confirmation to Albert Stenger, and after the assignment by Davenport to the Commercial Bank of the decree of foreclosure on the first

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mortgage, O'Brien procured an order of sale to be issued on the Davenport decree on account of the three junior liens above referred to, and procured a sale to be made to his grantor, obtaining a confirmation thereof and sheriff's deed after the commencement of the suit at bar and after the filing of the original petition herein, this cause having been tried on an amended or supplemental petition. It is not claimed that either he or his grantor paid any portion of the sum due on the decree of foreclosure on the first mortgage held by Davenport, or anything on the decree obtained by Stenger and the cross-petitioners in that suit, practically all of whom had liens superior to the three junior liens claimed by O'Brien to have been assigned to him. It is manifest that the sale and confirmation under the Stenger decree would cut out the junior liens of Rusche, Galley and Powers. Their liens were established in the Stenger decree, their relative priorities were fixed; their lien was upon the land, and a sale would be held to be an absolute satisfaction of their liens upon the land. There could be but one sale under that decree, and, so far as the land is concerned, the junior lien-holders mentioned are conclusively presumed to have obtained their money. It is very clear that the decrees mentioned could not be rejuvenated and made the basis of a title hostile to that of the purchaser under the Stenger decree. It would seem, therefore, that the position of plaintiff in error is wholly without merit, and the judgment of the trial court is right.

It is therefore recommended that the judgment of the trial court be affirmed.

HASTINGS, C. J. concurs.

AFFIRMED.

First Nat. Bank of Pawnee City v. Wishard.

THE FIRST NATIONAL BANK OF PAWNEE CITY, NEBRASKA,
v. HATTIE A. WISHARD, ADMINISTRATRIX OF THE
ESTATE OF MAGGIE WISHARD, DECEASED.

FILED JUNE 3, 1903. No. 12,319.

Commissioner's opinion. Department No. 1.

Attachment: DISSOLUTION OF PRIOR: EFFECT ON SUBSEQUENT: CONTRIBUTION.

ERROR from the district court for Pawnee county.
Tried below before STULL, J. *Reversed.*

Story & Story, for plaintiff in error.

G. T. Belding and Lindsay & Raper, contra.

PER COMMISSIONERS.

All the questions arising in this case seem to be settled in the case of *The First National Bank of Pawnee City v. The Avery Planter Co.*, — Neb., —, 95 N. W. Rep., 622. The questions are the right of a subsequent attaching creditor, whose lien has never been disturbed, to recover of a prior one, whose attachment has been, after sale and application upon it of the proceeds of the attached property, dissolved by a reviewing court, such proceeds for application upon the subsequent undissolved attachment, and the right of the first claimant to recover contribution for damages incurred in connection with other claimants in the endeavor to enforce the attachments. The same reasoning which is held to entitle the Avery Planter Company to recover in its case, and which is held sufficient to entitle the bank to offset, in that action, its claim for contribution, apply, with at least equal force, in this case.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

Fidelity Mutual Fire Ins. Co. v. Murphy.

THE FIDELITY MUTUAL FIRE INSURANCE COMPANY V.
MICHAEL MURPHY.

FILED JUNE 3, 1903. No. 12,650.

Commissioner's opinion. Department No. 1.

1. **Trial: CONTRACTS: ORAL EVIDENCE TO EXPLAIN.** Oral testimony may be introduced for the purpose of explaining an ambiguity in a written instrument.
2. **Insurance: KNOWLEDGE OF BREACH OF POLICY: WAIVER OF FORFEITURE.** "Where an insurance company, with knowledge of a breach of the conditions by the insured, fails to declare a forfeiture of the policy and continues to recognize its liability by demanding proofs of loss, it waives the defense based upon such breach of policy." *Home Fire Ins. Co. v. Phelps*, 51 Neb., 623, 71 N. W. Rep., 303, followed and approved.
3. **Trial: MISCONDUCT OF JUDGE.** Conduct of the trial judge examined and approved.

ERROR from the district court for Greeley county. Tried below before PAUL, J. *Affirmed.*

Baldrige & De Bord, for plaintiff in error.

J. R. Hanna and Doyle & Berge, contra.

OLDHAM, C.

In this suit plaintiff in the court below recovered a judgment for \$1,500 on a fire insurance policy issued by the defendant company, and the company brings error proceedings to this court.

The first objection called to our attention in the brief of plaintiff in error is as to the ruling of the trial court in admitting testimony to explain an apparent ambiguity in the description of the location of the property insured. The description contained in the policy was as follows:

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"Applicant's value.	Sum to be insured.
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"1. One 2-story shingle roof frame building, and additions adjoining and communicating, including foundations and all permanent attachments and fixtures belonging thereto while occupied as hardware store,

None.

"2. On counters, shelving, show-cases, safe, scales, and any other furniture, fixtures used in the business,

None.

"3. On stock of merchandise consisting principally of hardware, tinware, furniture, undertaking goods, boots and shoes, also carriages and wagons, in warehouse fifty feet in rear of above building, also on furniture in storage in building about ten feet east of above building, and all other merchandise not more hazardous, usually kept for sale in stores of this kind, all while contained in said building,

\$5000,	\$1500
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"All situated on lots 10, 11, 12, block 34 of Greeley Center. \$2,000 other insurance permitted concurrent herewith."

The testimony admitted showed that the stock of goods was, at the time the policy issued, nearly all contained in the two-story building, which is designated in the plat as building "A," and situated on lots 11 and 12, in block 34; that about fifty feet west of building "A" is a warehouse marked on the plat as building "B," and situated on lot 12; that ten or fifteen feet north of building "A" is a warehouse marked building "C," situated on lot 10. The court permitted the application for the policy to be introduced, which showed that the goods were situated in building "A" and additions. The policy itself showed

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that the buildings were situated on lots 10, 11 and 12, in block 34. The court also permitted the plaintiff to show that the agent taking the risk knew the location of the goods, and that some time after the policy had issued plaintiff notified defendant, through its agent, that he had removed all goods from building "C" to building "A," and that defendant on receipt of said notice sent a written permission to him to keep the goods in the buildings "A" and "B," situated on lots 11 and 12. When the fire occurred, buildings "A" and "B" were destroyed, the goods insured being in building "A" and none in building "B." The contention of the company was that a technical construction of the policy would show that they had only insured goods situated in buildings "B" and "C," and that as no goods covered by their policy were in "B" at the time of the fire, and as building "C" was not burned, the court should have excluded this testimony and directed a verdict for the company. The testimony introduced was not for the purpose of contradicting the terms of a written instrument, but only to aid an ambiguous description. It is elemental that oral evidence may be introduced for the purpose of explaining an ambiguity in a written instrument; hence we think the action of the trial court in this matter was fully warranted.

The next contention urged by the company is that the court should have directed a verdict for the defendant, because the plaintiff procured additional concurrent insurance on the goods covered by defendant's policy, without written consent of defendant. With reference to this contention the evidence shows that at the time the plaintiff took the policy from the defendant, permission was given in the policy for \$2,000 additional concurrent insurance; that such additional concurrent insurance was procured; and that plaintiff also procured \$1,000 insurance in another company upon a class of commission goods which he handled in connection with his general stock of merchandise. The evidence does not show that any of these commission goods were in the building in which the

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goods covered by defendant's policy were contained at the time of the fire. So that it is extremely doubtful under the evidence contained in the record whether or not this \$1,000 was additional or concurrent insurance. Again, the record shows that plaintiff informed the defendant's agent of this additional insurance and asked him to notify the company a long time before the fire took place, and there is some testimony in the record tending to show that the agent probably did so. But aside from all this, the evidence shows that when defendant's adjuster came to examine into the loss he was fully informed as to everything connected with this alleged additional concurrent insurance, and that having examined into it, he directed plaintiff's agent to proceed to make out his proofs of loss and instructed him fully as to how the proofs should be made; that, acting on such instruction, plaintiff's agent expended \$10 in money and much time in procuring proofs of loss as demanded by defendant's adjuster. This evidence we think is sufficient to show a waiver of this condition, for, as said in *Home Fire Ins. Co. v. Phelps*, 51 Neb., 623, 71 N. W. Rep., 303:

"Where an insurance company, with knowledge of a breach of the conditions by the insured, fails to declare a forfeiture of the policy and continues to recognize its liability by demanding proofs of loss, it waives the defense based upon such breach of policy."

No objection is made to any of the instructions given or requested by the trial court. The only other complaint urged is as to the action of the trial judge in stating to defendant's counsel, after overruling a number of dilatory pleas tendered by defendant: "These men (referring to plaintiff and others who had suits pending in said court against insurance companies) have been burned out, lost all they had, and I am going to give them an early trial." This remark was not made when the jury was present, but when the court was sitting for the purpose of settling issues, nearly a month before the case was tried. We see nothing in the remark prejudicial or meriting criticism of any kind.

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It is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and AMES, CC., concur.

AFFIRMED.

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FILED JUNE 8, 1903. No. 12,716.

Commissioner's opinion. Department No. 2.

1. Bills and Notes: CONTRADICTING TERMS: EVIDENCE OF PAROL AGREEMENT: TRIAL. The terms of a promissory note cannot be contradicted, altered or varied by evidence of a prior or contemporaneous parol agreement between the payor and the payee.
2. Bills and Notes: PLEADING INSUFFICIENT. The answer set out in the opinion, and *held* not to state a defense.

ERROR from the district court for Cuming county. Tried below before GRAVES, J. *Reversed*.

A. R. Oleson, for plaintiff in error.

Matt Miller, contra.

BARNES, C.

The plaintiff filed its petition in the district court for Cuming county, to recover the sum of \$160, with interest thereon at the rate of ten per cent. per annum, according to the terms of a promissory note executed and delivered to it by the defendants. The defendants, Levi Hawk and Ed Hawk, filed an answer in which they each admitted the corporate capacity of the plaintiff, the execution and delivery of the note set forth in the petition, and that no part of it had been paid, and alleged as a defense, "that there was nothing due upon the note" for the following reason, to wit:

“Defendants for further and other answer to the plaintiff’s petition allege the fact to be that on and prior to the 20th day of April, 1898, and about the year 1895, the defendants herein purchased from the plaintiff one mower and one harvester and binder; and that said harvester and binder, when so purchased from plaintiff, was wholly worthless and wholly unfit for the purpose of cutting and binding grain or performing the work for which it was sold by plaintiff, and for the purpose of doing the work for which defendants herein purchased the same.

“The defendants further allege that on or about the 20th day of April, 1898, the plaintiff herein sought to have the defendants herein renew some notes the defendants had formerly given to the plaintiff; that defendants herein refused to renew such notes or give any renewal note for notes then held by the plaintiff against these defendants; that then and there plaintiff insisted on the answering defendants giving them a renewal note for the notes held by the plaintiff; that these answering defendants then and there entered into an agreement with the plaintiff’s agent whereby they would give plaintiff a note for the amount of notes then held by plaintiff, against defendants, on one condition only, such condition being that plaintiff would make such harvester so purchased from the plaintiff run and do good work, and that if plaintiff did not make such machine work that such renewal note to be given by defendants was to become null and void and returned to the defendants.

“Defendants further allege that on such terms and conditions they gave the plaintiff the note set forth in the petition. They further alleged that the plaintiff never did make the machine work; that the machine was wholly worthless, and that plaintiff has wholly failed to perform the matters and things which it agreed to do at the time of giving the note in question, and has not done any of the things agreed by it to be done.” And they thereupon prayed for a judgment against the plaintiff for \$100 damages and costs of suit.

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The defendant, W. S. Hawk, filed an answer similar in form and substance to the one filed by his co-defendants, with the single additional allegation that he signed the note as surety. The facts set forth in the answers were denied by proper replies, in one of which it was alleged that the only consideration for the giving of the note in suit was the delivering up of some notes theretofore given by defendants to plaintiff, which notes were renewals of other notes which were given upon the consideration of the sale of a binder and mower by plaintiff to the defendants, and that the note in suit is a renewal of those notes theretofore given and renewed by defendants for said binder and mower purchased of plaintiff, and that the binder and mower and the notes delivered up at the time of the taking of the note in suit was the consideration and only consideration for the giving of the note by the defendants.

The cause was tried to a jury; and it appears from the evidence that on the 11th day of June, 1895, the defendants, Levi Hawk and Ed. Hawk, purchased of the plaintiff a mowing machine for the sum of \$40, and in payment therefor executed and delivered to plaintiff two promissory notes for \$20 each, payable at different times; that on July 12, 1895, defendants purchased a binder of the plaintiff for which three notes were given, one for \$30 and two for \$50 each, also payable at different times; that the notes given for the mowing machine and one note given for the binder had become due prior to October 27, 1896, and nothing had been paid thereon; and at that time the plaintiff obtained a renewal of those notes; that on April 20, 1898, all of the original and renewal notes had become due; that defendants had failed to make any payment thereon, and on that date a collector for the plaintiff called upon the defendants for the purpose of collecting them. The defendants being unable to pay them or any part thereof, all of the notes were merged into one renewal note for \$160, and thereupon all of the old notes were surrendered to the defendants. The re-

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newal note was also signed by W. S. Hawk as surety; and it is upon this note that this action is founded. The defendants were allowed, over the plaintiff's objections, to prove the contemporaneous oral agreement set out in their answer as a defense to the action. They also offered testimony tending to prove the worthlessness of the binder during the four years which they retained and used it; but no objection was made as to the quality or condition of the mower. Two of the old notes were executed in payment for that machine, and entered into the renewal note of \$160 upon which this suit was brought, and were surrendered at the time of its execution and delivery.

The court instructed the jury as follows:

"Instruction No. 5. You are instructed that if you find from a preponderance of the evidence that the note was executed at the time and in pursuance of the verbal agreement set out in defendants' answer and that the plaintiff failed and neglected to comply with the terms of said agreement and failed to put the said machine in repair as alleged in defendants' answer, then your verdict should be for defendants."

This instruction, together with others of a like nature, were duly excepted to. The jury returned a verdict for the defendants; judgment was entered thereon, and the plaintiff prosecuted error to this court.

It is first contended that the court erred in allowing the defendants to introduce evidence tending to prove the contemporaneous parol agreement set forth in the answers, over the plaintiff's objections. This point is well taken. The terms of a promissory note can not be altered or varied by evidence of a prior or contemporaneous parol agreement between the payor and the payee. *Garneau v. Cohn*, 61 Neb., 500; *State Bank of Ceresco v. Belk*, 56 Neb., 710; *Western Manufacturing Co. v. Rogers*, 54 Neb., 456; *Peterson v. Ferbrache*, ante, page 249, 93 N. W. Rep., 1011. It is the doctrine of this court, established by repeated decisions, that a written contract can not be varied or contradicted by a prior or contem-

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poraneous parol agreement between the parties. *Kaserman v. Fries*, 33 Neb., 427; *Van Etten v. Howell*, 40 Neb., 850; *Mattison v. Chicago, R. I. & P. R. Co.*, 42 Neb., 545; *Gerner v. Church*, 43 Neb., 690; *Quinn v. Moss*, 45 Neb., 614; *Commercial State Bank v. Antelope County*, 48 Neb., 496; *Sylvester v. Carpenter Co.*, 55 Neb., 621.

The note in suit stipulated for the payment of a certain sum of money on a specific date, while the evidence received over the objection of the plaintiff tended to establish that the defendants under certain conditions resting in parol were never to pay the note. The tendency of this evidence was to directly vary and contradict the terms of the note and it should have been excluded.

The second point is, that the court erred in giving instruction No. 5, above quoted. This contention should be sustained. As we have already stated, matters resting in parol can not be received to vary or contradict the terms of a written contract. Therefore the answer states no defense to the plaintiff's cause of action; and it was error to instruct the jury that if they found the facts alleged in the answer to be true, to return a verdict for the defendants. It would seem that the only defense available in this case would be one of a partial failure of consideration; but such defense was neither pleaded nor proved. The defendants having relied solely on the parol agreement for their defense, the court should have instructed the jury to return a verdict for the plaintiff.

For these reasons we recommend that the judgment of the district court be reversed and the cause remanded for a new trial.

GLANVILLE and ALBERT, CC., concur.

REVERSED AND REMANDED.

SEDGWICK, J., dissents.

McCormick Harvesting Machine Co. v. Hiatt.

THE MCCORMICK HARVESTING MACHINE COMPANY v. C.
J. HIATT.

FILED JUNE 3, 1903. No. 12,847.

Commissioner's opinion. Department No. 3.

1. **Pleading: INCONSISTENT ALLEGATIONS IN ANSWER: ELECTION: WAIVER.** In case the allegations of an answer are inconsistent, the proper remedy is by motion to require an election; unless such a motion is made, the objection is waived.
2. **Evidence: AMBIGUOUS ACTS: INTENT.** Where a person's acts are ambiguous, and the effect thereof depends upon the intention with which they were done, he may testify as to his reason for doing them.
3. **Contracts: WARRANTY: WAIVER OF TERMS.** A provision in a contract for sale of a machine that it shall be warranted according to the terms of a written warranty, contained therein, "without addition or erasure," does not preclude an agent of the seller from waiving such terms or some of them after the machine has been delivered.
4. **Contracts: WARRANTY: PAROL EVIDENCE OF SUBSEQUENT WARRANTIES: ADMISSIBILITY.** Parol evidence of a subsequent agreement whereby the seller made further and different warranties, in order to induce the buyer to execute notes for the purchase price notwithstanding he claimed the original warranty was not complied with, is admissible.
5. **Trial: BURDEN OF PROOF: INSTRUCTIONS: PREJUDICE: ISSUES.** An instruction that a defendant has the burden of proving "the material allegations of his defense," without stating what allegations are material, is not to be commended; but it is without prejudice where a prior instruction sets forth the issues raised by the defendant's answer upon which the jury are to pass.

ERROR from the district court for Gage county. Tried below before LETTON, J. *Affirmed.*

Doyle & Berge, for plaintiff in error.

Hazlett & Jack, contra.

POUND, C.

The plaintiff brought this action to recover upon three promissory notes executed by the defendant, as they re-

. McCormick Harvesting Machine Co. v. Blatt.

cite on their face, in payment of the purchase price of a binder. The defendant pleaded that, at the time the machine was purchased, the plaintiff delivered to him a warranty in writing in which the machine was warranted to be well made, of good material and durable with proper care, and it was agreed that if, upon one day's trial, the machine should not work well, the purchaser should give immediate notice to the seller or its agent and allow time to send some one to put it in order. The warranty pleaded further set forth that, if the person so sent could not make the machine work properly, the purchaser should return it at once to the agent of whom he received it, and that continuous use of the machine or use at intervals through the harvest season or failure to notify the seller or to return the machine should be deemed an acceptance. The defendant alleged that the machine failed to work; that he notified the plaintiff of such fact and the plaintiff sent an expert to put the machine in repair; that the expert failed to make it work; that thereupon the plaintiff through its agents renewed the original warranty and promised the defendant that if he would give his notes, according to the terms of the contract, the plaintiff would continue the warranty and put the machine into the best of repair, when, if it again failed to work, it might be returned, at the option of the defendant. He alleged that thereafter the machine failed to work and the plaintiff made several attempts to remedy the defects, but, failing to do so, requested the defendant to retain it until the following season, when the company would repair the machine and, if it did not then work, would return the defendant his notes and money and take back the machine. He alleged further that the plaintiff failed to comply with this last agreement, and that, as the machine was absolutely worthless, he returned it to the plaintiff. By way of reply, the plaintiff, after denying all the allegations with reference to the failure of the machine to work and the alleged warranties subsequent to the written contract, alleged that the defendant failed to comply with the terms

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and conditions of the written warranty and accepted and used the machine during the harvest of 1896 and 1897, and that no agent of the plaintiff had any power or authority to change, alter or waive the terms of the written warranty or any of them. Upon these issues the cause was tried to a jury, which found for the defendant.

It is contended, on behalf of the plaintiff, that the allegations of the answer are inconsistent in that the defendant claims damages for a breach of the contract and at the same time attempts to plead a rescission. This objection, if well taken, must be treated as waived for the reason that no motion was made in the court below to require the defendant to elect. *Dunn v. Bozarth*, 59 Neb., 244. The remaining errors assigned relate to certain rulings upon evidence and to the instructions of the court. Several of the rulings challenged need not be reviewed for the reason that the court, after overruling objections to the questions asked, struck out the answers to the questions upon motion of the plaintiff. During the examination of the defendant as a witness on his own behalf he was asked this question:

"Why did you still persist in the cutting of this grain, working with it (the machine) when you say it did not do good and satisfactory work?"

To this the defendant answered:

"The reason I did this, they told me to go ahead and use the machine and they would make it good that year."

This question and the answer thereto are complained of upon the ground that the question called for a conclusion of the witness and the answer gave a conclusion only and not a fact. All facts are more or less conclusions of the witness. It would be impossible for a witness to testify, if he had to detail to the jury the whole of the mental process by reason of which he knew or claimed to know facts to which he testified. Where a person's acts are ambiguous and the effect thereof depends upon the intention with which they were done, he may testify as to his reason for doing them. *Hackney v. Raymond Bros.*

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Clarke Co., — Neb., —, 94 N. W. Rep., 822. In such case the witness is not testifying to a mere opinion but to a fact; the intention with which he did the acts in question being a material fact in determining their legal effect. In this case the plaintiff claimed that the defendant's acts were intended to be and were an acceptance of the machine, while the defendant claimed that he acted in reliance upon the agreement of the plaintiff to put the machine in good order, and with no intention of accepting it in its then condition. It is contended also that the agent of the plaintiff had no power to waive the provisions of the written warranty, and that parol evidence of the subsequent agreements pleaded in the answer was not admissible. The written contract provides that the machine shall be warranted according to the terms of the written warranty "without addition or erasure." We do not think this precluded the agent of the seller from waiving the terms of the written warranty, or some of them, after the machine had been delivered. There is no stipulation against waiver of those terms in the warranty which are for the benefit and protection of the seller, and no limitation upon the authority of agents to make such waiver is contained therein. Sending agents to attempt to put the machine in good order and acting upon the theory that it was bound to do so, was certainly a waiver of the provisions of the written warranty limiting the right of the defendant to one day's trial. *Aultman & Co. v. Trout*, 27 Neb., 199. Moreover, the plaintiff can not take the notes which its agent obtained by waiving the provisions of the contract and entering into a new agreement, and at the same time claim that the action of the agent through which the notes were procured was unauthorized. *Osborn Co. v. Jordan*, 52 Neb., 465. It is even more clear that parol evidence of the subsequent agreements, whereby the seller made further and different warranties in order to induce the buyer to execute notes for the purchase price notwithstanding he claimed that the original warranty was not complied with, was admissible. These were new contracts, upon consideration,

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modifying or superseding the original contract. For that matter, it was not even necessary that they be supported by a consideration, the consideration of the original contract being sufficient for that purpose. *Bowman v. Wright*, — Neb., —, 91 N. W. Rep., 580. The instructions of the court are criticised not only upon the grounds just considered, but also for the reason that they are not justified by the evidence. It is not necessary to review the evidence on these points. After examination of the record, we are satisfied that there was ample testimony to justify the submission of each of the questions left to the jury, and that the verdict is fully supported.

A more serious question arises upon an instruction that the defendant had the burden of proving "the material allegations of his defense" without stating what allegations were material. Such instructions are not to be commended, and, in cases where the issues are not clearly stated in the charge, may be ground for reversal. *Murray v. Burd*, 65 Neb., 427, 91 N. W. Rep., 278. But a prior instruction in this case set forth clearly and distinctly the issues raised by the defendant's answer upon which the jury were to pass. While it does not say explicitly that the issues so stated were the material allegations of the answer, when the two instructions are taken together there could scarcely be any misunderstanding of the matter or any doubt that such was the meaning of the court.

We therefore recommend that the judgment be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

AFFIRMED.

SHENANDOAH NATIONAL BANK v. J. J. GRAVATTE.

FILED JUNE 3, 1903. No. 12,858.

Commissioner's opinion. Department No. 2.

1. **Fraud:** SIGNATURE OBTAINED BY FRAUDULENT REPRESENTATIONS: NEGLIGENCE: BILLS AND NOTES. Where the signature of a person is obtained to a promissory note, which he is unable to read, by

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false and fraudulent representations, whereby he is induced to believe that he is merely signing a receipt, the note cannot be enforced, even in the hands of a *bona fide* holder, where it appears that the maker was without any fault or negligence in signing the instrument.

2. **Fraud: SIGNATURE OBTAINED BY FRAUDULENT REPRESENTATIONS: NEGLIGENCE: BILLS AND NOTES: EVIDENCE REQUIRED.** Where the fraud in obtaining the signature of the maker is established, it is sufficient for the maker to show that he was free from fault and negligence in signing the instrument, and he is not required to show that he is not chargeable with "misplaced confidence in others." *Dinsmore & Co. v. Stimbert*, 12 Neb., 433, modified.

ERROR from the district court for Douglas county. Tried below before SLABAUGH, J. *Affirmed.*

Baldrige & De Bord, for plaintiff in error.

In cases where a party has been induced to sign a note through fraud of others, it has been held that he must, in order to avoid payment of the note after it has come into the hands of a *bona fide* purchaser for value, show that he was absolutely free and clear of laches, negligence or misplaced confidence. *Dinsmore v. Stimbert*, 12 Neb., 433; *First National Bank v. Lierman*, 5 Neb., 247; *Willard v. Nelson*, 35 Neb., 651; *Ross v. Doland*, 29 Ohio St., 473; *Douglass v. Matting*, 29 Ia., 498, 4 Am. Rep., 238; *Cannon v. Lindsey*, 85 Ala., 198; *Fisher v. Von Behren*, 70 Ind., 19, 36 Am. Rep., 162; *Roach v. Karr*, 18 Kan., 529, 26 Am. Rep., 788; *Abbott v. Rose*, 62 Me., 194, 16 Am. Rep., 427; *Chapman v. Rose*, 15 Am. Rep., 401; *Bedell v. Herring*, 77 Cal., 572, 11 Am. St. Rep., 307; *Shirts v. Overjohn*, 60 Mo., 305; *Mackey v. Peterson*, 29 Minn., 298.

Matthew Gering, contra.

The verdict of the jury upon the question of negligence or misplaced confidence is conclusive. *Willard v. Nelson*, 35 Neb., at page 653.

When the signature of an illiterate person is obtained to a promissory note by the payee fraudulently inducing him to believe that he is signing an instrument of an

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entirely different character, without any fault or negligence of the maker, the note can not be enforced even in the hands of a *bona fide* holder. *First National Bank v. Lierman*, 5 Neb., 247; *Walker v. Ebert*, 29 Wis., 194-196; *Webb v. Corbin*, 78 Ind., 403; *Bowers v. Thomas*, 62 Wis., 480; *Soper v. Peck*, 51 Mich., 563; *Briggs v. Ewart*, 51 Mo., 245; *Dinsmore & Co. v. Stimbert*, 12 Neb., 433.

ALBERT, O.

This is an action on a promissory note alleged by the plaintiff to have been executed and delivered by the defendant Pfeifer to his co-defendant, and afterward, in the usual course of business, before maturity, and for a valuable consideration, indorsed and delivered to the plaintiff. The defendant Gravatte made default. Pfeifer filed an answer admitting that he signed and delivered the instrument, but alleging that his signature thereto was obtained by fraud in that the agents of the payee falsely and fraudulently represented to him, at the time he signed said instrument, that it was merely a receipt for fruit trees; that he relied upon said representations and believed them to be true and was thereby induced to sign the instrument. The plaintiff replied denying the affirmative matter set up in the answer and also pleading, in addition thereto, the following:

"And for further defense (reply) alleges that the said defendant Pfeifer, had had dealings with the said J. J. Gravatte prior to the inception of the said note herein sued upon, and the said defendant had prior to said time accused the said J. J. Gravatte of fraud in the inception in the procuring, by the said J. J. Gravatte of a note from the defendant and that the said defendant, notwithstanding he believed that the said J. J. Gravatte was guilty of fraudulent practices gave to the said J. J. Gravatte and persons representing him the note in suit, and was thereby guilty of laches; and upon his signing said paper, and delivering the same to the said J. J. Gravatte, placed it in the power of the said J. J. Gravatte to transfer and sell

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said note to innocent purchasers to the detriment and damage of said purchasers; and the said Pfeifer is guilty of such laches and negligence and misplaced confidence, that he is now estopped to assert, as against this plaintiff or as against the said E. S. Welch, that the said note was given in fraud, the procuring by him by fraudulent means."

The fraud in procuring the note and the negligence of the defendant Pfeifer in giving the same were the only questions presented to the jury by the court. The jury returned a general verdict for the defendant Pfeifer, and judgment was given accordingly. The plaintiff brings the case here on error.

The sole contention of the plaintiff in this court is that Pfeifer, in signing the instrument, was guilty of negligence and that, therefore, the defense of fraud is not available as against the plaintiff who, on the face of the record, must be held to be a *bona fide* holder of the note. In support of this contention we are cited to *Dinsmore & Co. v. Stimbert*, 12 Neb., 433, wherein this court held that to enable a party to resist the payment of a negotiable note in the hands of a *bona fide* purchaser, on the ground that it was procured through fraud and circumvention, the maker must show that he is not chargeable with any laches or negligence or misplaced confidence in others. The last clause, "or misplaced confidence in others," states the law a little too strongly against the maker and perhaps stronger than the court intended to state it, because in the second head note the court says that, in such case, the jury should be told that to make the defense of fraud available the defendant must show that he was not guilty of any negligence in signing the paper. If full effect were to be given to the clause, "misplaced confidence in others," it would preclude the defense of fraud in all cases where the maker of the note is tricked into signing it, because in all such cases there must necessarily be the element of misplaced confidence. That the defense of fraud is not precluded in all such cases is clear from the

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holding of this court in *Willard v. Nelson*, 35 Neb., 651, where the rule is thus stated:

"When the signature of an illiterate person is obtained to a promissory note by the payee fraudulently inducing him to believe that he is signing an instrument of an entirely different character, without any fault or negligence of the maker, the note cannot be enforced even in the hands of a *bona fide* holder."

Such is the rule generally given by text writers. 1 Daniels, *Negotiable Instruments* [5th ed.], section 849; 4 Randolph, *Commercial Paper* [2d ed.], section 1893. That being the rule, and as the question of negligence was one for the jury, the only question presented is whether the evidence is sufficient to sustain a finding that Pfeifer in signing the note was free from fault and negligence.

The plaintiff relies on the testimony of Pfeifer himself to show that he was guilty of negligence. His testimony shows that he is a man of 73 years of age; that he is a German, understanding the English language imperfectly, and unable to read it at all. His evidence also shows that the payee of the note had previously induced him to sign an order for some \$300 worth of fruit trees, upon the false and fraudulent representation that he was signing an order for \$20 worth. This, the plaintiff contends, was sufficient to put Pfeifer on his guard in subsequent dealings with him. But while the evidence shows that the note in question was signed subsequent to the foregoing transaction, and after Pfeifer had learned of the fraud practiced upon him therein, it also shows that Gravatte was not present when the note was signed, but that it was presented to Pfeifer for his signature by Gravatte's agent, who was accompanied by a real estate agent who spoke and wrote both English and German, and appeared at the time to be disinterested. When the note was presented to Pfeifer for his signature, according to his testimony, Gravatte's agent represented that it was merely a receipt for the "head man" and was necessary in order to get some trees which Gravatte had agreed to furnish

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Pfeifer to replace some previously delivered which had died. The real estate agent examined the paper and confirmed the agent's statement as to its nature, and assured Pfeifer that it was all right. Upon these representations Pfeifer signed the instrument. Assuming that this testimony is true, as we must for present purposes, we do not think it can be said, as a matter of law, that Pfeifer was guilty of negligence in signing the instrument. In fact he did what most men would have done under like circumstances. He availed himself of the best and only means at hand for informing himself of the contents of the paper. We think the evidence was ample to warrant the submission of the question of negligence to the jury, and to sustain a finding that Pfeifer was free from fault and negligence in signing the note.

It is therefore recommended that the judgment of the district court be affirmed.

BARNES and GLANVILLE, CC., concur.

AFFIRMED.

HOWARD M. GARDNER ET AL. V. FRANK HAGERMAN ET AL.

FILED JUNE 3, 1903. No. 12,864.

Commissioner's opinion. Department No. 3.

Mortgages: FORECLOSURE: APPRAISAL: OBJECTIONS AFTER SALE.

ERROR from the district court for Red Willow county. Tried below before NORRIS, J. *Affirmed.*

S. R. Smith, for plaintiffs in error.

C. C. Marlay and Flower, Peters & Bowersock, contra.

DUFFIE, C.

This is a proceeding in error to review the action of the district court in confirming a sale of real estate under a decree of foreclosure. The errors assigned all relate to

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the appraisement of the land, no irregularities in the conduct of the sale or fraud in the appraisement being alleged. The objections were not filed until after the sale, and the rule has long prevailed that objections to the appraisement, except upon the ground of fraud, come too late after the sale has been made. *Phoenix Mutual Life Ins. Co. v. Williams*, 3 Neb. [Unof.], 79, 90 N. W. Rep., 756; *Foster v. McKinley-Lanning Loan & Trust Co.*, 3 Neb. [Unof.], 65, 90 N. W. Rep., 765.

It is recommended that the order of the district court be affirmed.

POUND and KIRKPATRICK, CC., concur.

AFFIRMED.

FRANK TICHY, SR. ET AL., APPELLANTS, V. JOSEPH SIMECEK
ET AL., APPELLEES.

FILED JUNE 3, 1903. No. 12,868.

Commissioner's opinion. Department No. 2.

1. **Fraudulent Conveyances: CONSIDERATION: UNDUE INFLUENCE: EVIDENCE SUFFICIENT.** Evidence contained in the bill of exceptions examined and *held*, that the consideration for the conveyance sought to be set aside for fraud and undue influence, was adequate.
2. **Fraudulent Conveyances: IMBECILITY: UNDUE INFLUENCE.** In absence of fraud, or undue influence, mere imbecility or weakness of mind will not avoid a contract or deed.
3. **Fraudulent Conveyances: PHYSICIANS AND SURGEONS: CONFIDENTIAL RELATIONS: EVIDENCE INSUFFICIENT.** The fact that a physician interested in the conveyance sought to be set aside, gave the person who made it professional treatment some two months before the transaction complained of took place, and again about four months thereafter, is not sufficient to establish the existence of the confidential relation of physician and patient at the time the conveyance was made.
4. **Fraudulent Conveyances: DECREE CORRECT.** *Held*, That the decree of the trial court conforms to the findings and should be affirmed.

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APPEAL from the district court for Saline county. Tried below before STUBBS, J. *Affirmed.*

Frank H. Woods, A. S. Sands and W. F. Bartos, for appellants.

Geo. H. Hastings and Robert Ryan, contra.

BARNES, C.

The appellants commenced this action in the district court for Saline county, to set aside a deed by which one Henry Tichy had conveyed the west half of the northwest quarter of section 14, township 6, range 4 east, situated in said county, to the appellee, Katie Simecek, and two mortgages made by him to appellee, Joseph Simecek. The allegations of the plaintiff's petition were, in substance, that on or before the 12th day of January, 1900, Henry Tichy (now deceased) was the owner and in possession of said premises; that defendant Joseph Simecek is a practicing physician, and at the time of the execution of the deed in question was residing and practicing his profession at Wilber, Saline county, Nebraska; and that the defendant Katie Simecek is his wife; that on January 12, 1900, Henry Tichy made a deed conveying said land to Katie Simecek for the expressed consideration of \$3,250; that the deed was procured for, received and recorded by her husband, Joseph; that on the same day the defendants conveyed to Henry Tichy, as a part consideration for said land, lots 31 and 32 in Mann's addition to the village of Wilber; defendants also assumed and agreed to pay a mortgage on said land of \$1,000, and paid to Henry Tichy \$300 in cash; that the town lots were not worth to exceed \$800 to \$1,300, and that the mortgage assumed and the \$300 in cash, made up a total consideration of \$2,600 for said land; that the same day defendant Joseph Simecek induced Henry Tichy to execute a mortgage for \$300 to Frank Tichy, Sr., on the lots so conveyed to him, as a pretended consideration for a quitclaim deed

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made by Frank Tichy, Sr., to the land above described; that on April 17, 1900, defendant Joseph Simecek induced Henry Tichy to execute a mortgage to him for \$200 on the lots above described, but that the same was wholly without consideration, and on September 1, 1900, said defendant induced Henry Tichy to execute another mortgage to him on the same lots for \$350, wholly without consideration; that soon thereafter said Henry Tichy departed this life, and Frank Tichy, Jr., was duly appointed administrator of his estate; that Frank Tichy, Sr., is his father and only heir at law, and that this action is brought to set aside said deed and mortgages from Henry Tichy to the defendants, and it is alleged that at the time these conveyances were made said Henry Tichy was sick, and enfeebled in body and mind, and wholly incapable, by reason of his mental condition, of making such conveyances and of transacting any business; that said Joseph Simecek was, at that time, his physician and took advantage of his confidential relation to and with said Henry, and thus induced him to make such conveyances without consideration, and thereby defrauded him out of his said property. Plaintiffs also tendered to defendants a deed to the lots and the sum of \$300 in money.

The defendants by their answer denied that any of the transfers or conveyances made by Henry Tichy to them, or either of them, were made at their request or solicitation; and further denied that said conveyances, or either of them, were procured by any influence or control exercised by them, or either of them, over the said Henry Tichy; and alleged that said conveyances were made by him at his own suggestion, and for the full consideration, actually paid, that was expressed therein. It was further alleged that the consideration for the land in question was \$3,250, that it was paid in the manner following, to wit: \$15 by medical services to the mother of said Henry Tichy; \$1,800 by the conveyances of lots 31 and 32 of Mann's addition to the village of Wilber; \$1,000 by assuming a mortgage upon

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the land, of that amount, and by \$435 cash paid in hand at the time; that the several sums so paid were a full, fair and adequate consideration for the land. The two mortgages, one for \$200 and one for \$350, are set up in the answer and their foreclosure is prayed for. It was further stated therein that, as a part of the original transaction between Henry Tichy and Katie Simecek, on the 12th day of January, 1900, Frank Tichy, Sr., duly made and executed a quitclaim deed of the land in controversy to his son, Henry, for an expressed consideration of \$1, but in truth and in fact the mortgage of \$300 given by Henry Tichy to Frank Tichy, Sr., upon lots 31 and 32 in Mann's addition to the village of Wilber, was the real consideration for said quitclaim deed; that said Frank Tichy, Sr., still holds and retains said mortgage; that he is forever estopped thereby from claiming any right or title to the land in question. The answer concluded with a prayer that the plaintiff's action be dismissed, and that the two mortgages be foreclosed, and the premises upon which they are a lien be sold to satisfy the amount found due thereon. To this answer the plaintiff replied, first, by a general denial, and second, by further reiterating at considerable length the charges contained in their petition.

Upon these issues the cause was tried without intervention of a jury. The court found generally on the issues joined in favor of the defendants, and further found "That at the date of the execution of the deed from Henry Tichy to Katie Simecek, to wit, January 12, 1900, Henry Tichy was mentally competent to make the conveyance, and that the quitclaim deed from Frank Tichy, Sr., to Henry Tichy was made with full knowledge on the part of said Frank Tichy, Sr., of the contents and purpose of the deed, and without any fraud, misrepresentation or undue influence, and for the consideration mentioned in the mortgage, executed the same day by Henry Tichy to Frank Tichy, Sr." The court thereupon rendered a decree dismissing the plaintiff's cause of action. The court further found for the defendant, Joseph Simecek, on his cross-petition, and

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that there was due him on the notes and mortgages executed by Henry Tichy the sum of \$615.29, with interest at seven per cent. per annum, and rendered a decree foreclosing the mortgages on the lots described therein, subject, however, to the first lien of the mortgage, for \$300, given to Frank Tichy, Sr.

The plaintiffs thereupon appealed to this court, and contend: First, that the consideration for the deed from Henry Tichy, deceased, to Katie Simecek, was inadequate and insufficient; second, that at the time of making said deed and the mortgage above referred to, said Henry Tichy was insane and incompetent to make said instruments; third, that Dr. Simecek exercised undue influence over, and took advantage of, said Henry Tichy by virtue of the confidential relations which they sustained, viz., that of physician and patient, and so fraudulently procured the conveyance of said land to his wife, Katie; fourth, that the decree is contrary to, and can not be supported by, the finding of the court. These contentions will be disposed of in the order stated. Under the former rules of this court it would only be necessary for us to examine the record far enough to ascertain that there was some competent evidence to support the findings and decree; but in view of our decision in the case of *Faulkner v. Sims*, — Neb., —, 94 N. W. Rep., 113, and the act of the legislature recently passed and approved making it the duty of the appellate court, in reviewing appeals in suits in equity, to examine the evidence and arrive at conclusions of fact and law independent of the findings of the trial court, we have carefully reviewed all of the evidence and will proceed to state our conclusions.

1. As to the question of the inadequacy of the consideration for the deed. It appears in the evidence that the actual value of the land was somewhere between \$2,600 and \$4,000. There is evidence in the record tending to show that Frank Tichy, Jr., wanted to buy it from Henry about the time it was sold to the appellees; that he was prepared to pay \$2,600 therefor, but would not pay any

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more, stating at the time "that it was all the land was worth."

It further appears that a farm, consisting of 160 acres, lying within half a mile of the land in question, and said by all of the witnesses to be of a better quality, was sold about that time for \$5,500. Some of the witnesses fixed the value at \$2,600; some at \$2,800; others at \$3,000, and some testified that the land was worth \$4,000. It is alleged in the petition that it is worth \$3,500, and a fair average of the testimony discloses that it was actually worth not to exceed \$3,200 or \$3,300; the consideration expressed was \$3,250, so that the consideration, if paid at all, was its fair market value. It is alleged in the petition that the consideration really paid was inadequate, and that as a matter of fact the two lots conveyed to Henry Tichy, which were situated in the village of Wilber, were worth only \$800 to \$1,300, and that only \$300 in cash in addition thereto was paid him by the appellees. The evidence fails to sustain these allegations. Considering the evidence on the value of the lots at first hand, without regard to the findings of the trial court, we are constrained to hold that they were, with the improvements thereon, reasonably worth \$1,800. The testimony shows beyond question that Dr. Simecek paid Henry Tichy \$450 in cash, or its equivalent, at the time the conveyances were made. It further appears that he and his wife assumed and agreed to pay the mortgage, amounting at that time to \$1,000. So that Henry Tichy received for the land in cash, and property valued at its fair market price, the full sum of \$3,250, the amount of consideration expressed in his deed.

We therefore find that the plaintiffs failed to establish their allegations of inadequacy of consideration.

2. The appellants having alleged that, at the time the deed and mortgages in question were made, Henry Tichy was insane, and incompetent to make them, it was incumbent upon them to overcome the presumption of sanity by competent proof. In order to sustain this

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allegation they produced several non-expert witnesses who testified that deceased had at one time been seen riding in a wagon with his hired man, who was sowing rye from the rear end thereof; that the ground was not suitably prepared, and that his farming was poorly done; that he had dug a well near a stream of water that ran through his land; that one or two of his cattle died when he was sick and not able to care for them, and that he contrived a way to fasten an umbrella to his riding cultivator and shaded himself thereby while cultivating his corn. From these peculiar actions they concluded that his mind was unsound, and yet they all testified that he transacted his own business, bought and sold and marketed his own products. It is evident he was a poor farmer, but that fact is no evidence of insanity. If it were proof of that condition of mind our asylums would be overcrowded. It was also shown that he was in poor health, and had at some time, no one could fix the date, contracted syphilis, and thereafter suffered badly therefrom, so that later on he had a paralytic stroke from which he only partially recovered; that he was obliged to walk with a cane, and was really in a deplorable condition, so far as his bodily health was concerned. In answer to certain hypothetical questions, supposed to be based on these conditions, two or three physicians testified, as experts, that in such a case the patient's mind would be badly affected, and he would be mentally incompetent to do business. This evidence, when carefully examined in the light of the plaintiff's testimony, introduced to show the relation of physician and patient between Dr. Simecek and the deceased, fails to establish the allegations of the petition. It appears that the doctor first commenced to treat the deceased for hemorrhoids on June 16, 1899; that between that date and July 19th following, he operated on him twice for that ailment, and discharged him from further treatment on this later date. It further appears that from that time until October 7, 1899, the doctor gave deceased no further treatment, but on that date he again

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commenced to treat him; and on the 16th day of that month operated on him for syphilitic trouble. This treatment was continued until November 19, 1899, when the patient was again discharged. It appears that the next time he was given treatment by the doctor was on the 2d day of April, 1900, when the disease again showed itself, and from that time until he died the treatment was continued; that the paralytic stroke spoken of did not occur until sometime in July, 1900, and thereafter deceased walked with a cane. So it clearly appears that the condition on which the expert evidence was based did not exist at all at the time the deed was made. On the other hand, eight witnesses who knew deceased well, and had been acquainted with him for many years, testified that at that time he was doing his own business, buying, selling, and marketing his own produce; was sane and fully competent to conduct his own business and make conveyances of his property. It is probably true that Henry Tichy was somewhat eccentric, and did not possess the highest degree of intelligence, yet it clearly appears that at the time he made this trade and deeded his land to Katie Simecek his faculties, such as they were, were unimpaired by sickness or disease. Weakness of understanding alone is not sufficient to avoid a deed. *Franklin v. Kelley*, 2 Neb., 79.

In the case of *Johnson v. Phifer*, 6 Neb., 401, it is stated that mere imbecility or weakness of mind will not avoid a contract or deed. There must be a total want of reason or understanding. This rule has been modified somewhat, and may now be stated as follows: In order to avoid a contract on the grounds of insanity, it must appear not only that the person was unsound of mind, or insane when it was made, but that this unsoundness or insanity was of such a character that he had no reasonable perception or understanding of the nature of the contract. *Ellwood v. O'Brien*, 74 N. W. Rep. [Ia.], 740; *Campbell v. Campbell*, 51 Ia., 713; *Burgess v. Pollock*, 53 Ia., 273; *Dewey v. Allgire*, 37 Neb., 6; *Hay v. Miller*, 48 Neb., 156; *DeWitt v. Mattison*, 26 Neb., 655.

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We therefore find that the appellants failed to show that Henry Tichy was incapable of conveying his property by reason of unsoundness of mind, as alleged in their petition.

3. On the question of the alleged confidential relation of physician and patient, we find that it did not exist at the time of the transactions complained of. It is shown by the evidence of those present at that time, that nothing was said or done by either of the appellants from which the existence of any undue influence could be inferred. The testimony of the notary, Spirk, is conclusive on that point.

4. It is established beyond dispute that Dr. Simecek gave the money to the deceased, which the mortgages on the lots in the village of Wilber secured. And while the appellants state that it is not shown what Tichy did with this money, it was not incumbent on the appellees to show what became of it. The original checks given by the doctor to the deceased, admittedly indorsed by him and paid by the bank on which they were drawn, were produced, and, so far as this inquiry is concerned, it is immaterial what disposition he made of the money paid him thereon.

The decree of the trial court conforms to the findings and duly preserves the mortgage for \$300 given to Frank Tichy, Sr., as a first lien on these lots. The appellants did not seek a foreclosure of that mortgage in the action, and therefore the decree did not provide for such foreclosure. They may still resort to that remedy if they so desire.

For the foregoing reasons we hold that the decree of the district court was right, and we recommend that it be in all things affirmed.

GLANVILLE and ALBERT, CC., concur.

AFFIRMED.

Farmers & Mechanics Bank of Havelock v. Wilson.

FARMERS & MECHANICS BANK OF HAVELOCK, NEBRASKA,
V. CLAUDE S. WILSON.

FILED JUNE 3, 1903. No. 12,870.

Commissioner's opinion. Department No. 1.

Fraudulent Conveyances: BANKRUPTCY: PREFERENCE WITHIN FOUR MONTHS: STATUTES. In an action by a trustee in bankruptcy to recover, under section 60 of the bankrupt law, the amount of a preference given within four months of the filing of a petition in bankruptcy, *held* error to instruct the jury that it is sufficient to prove that the defendant had reasonable cause to believe the bankrupt was insolvent "or that it was acquainted with facts as to the condition of said company that would lead to a reasonable doubt of its solvency."

ERROR from the district court for Lancaster county.
Tried below before HOLMES, J. *Reversed.*

Geo. A. Adams, for plaintiff in error.

Hall & Marlay, contra.

OLDHAM, C.

Plaintiff in the court below filed a petition alleging that on December 31, 1900, The National Cigar Company, a corporation, was doing business in Lincoln, Nebraska; that it was and had been insolvent, and was indebted, among others, to the defendant in the sum of \$700; that defendant knew of the insolvency of the company, and procured the payment of its obligation by collusion and fraud; that the payment was made by the company while insolvent, and was a preference in behalf of defendant as a creditor of the company in violation of the bankrupt act, and that within four months of the transaction the company was duly adjudged a bankrupt, and the plaintiff was appointed trustee of the bankrupt estate, and brought this suit to recover the amount of the payment for the benefit of all the creditors. Defendant answered alleging that the transaction was in good faith, without intent to

Farmers & Mechanics Bank of Havlock v. Wilson.

violate the bankrupt act, and that it had no knowledge of the insolvency of the company at the time its obligation was paid. On issues thus joined there was trial to a jury; verdict for plaintiff; judgment on the verdict, and defendant brings error to this court. There was evidence introduced sufficient to have sustained a verdict for either of the parties.

It will be observed from the foregoing statement that the action was founded on that portion of section 60 of the bankrupt law which provides as follows:

"If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition or before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

On the question of notice of the insolvency, the court instructed the jury at the request of plaintiff as follows:

"You are instructed that in order to constitute notice of insolvency, it is not necessary to prove actual knowledge on the part of the bank or its cashier, but it is sufficient to prove that said defendant had reasonable cause to believe said company was insolvent, or that it was acquainted with facts as to the condition of said company that would lead to a reasonable doubt of its solvency, or place a prudent man on inquiry and to conclude said company could not pay its debts."

Defendant complains particularly of that part of the instruction which says: "or that it was acquainted with facts as to the condition of said company that would lead to a reasonable doubt of its solvency"; contending that this is a misstatement of the law of constructive notice as to the insolvency of the bankrupt. It seems to us that this contention is not without merit. We do not think it is necessary to show in cases like this that the creditor taking a preference had actual knowledge of the insolvency

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of the debtor at the time of the preference, but that, on the other hand, it is sufficient if the facts show that he had reasonable cause to believe the debtor insolvent. This, however, is as far as the rule goes. The knowledge of the one taking the preference must be of such a nature as to start an inquiry which if pursued to its legitimate end would lead to a belief of insolvency and not to a doubt concerning it. *May v. Le Claire*, 18 Fed. Rep., 164; *Claridge v. Kulmer*, 1 Fed. Rep., 399; *In re Eggert*, 102 Fed. Rep., 735; *Grant v. First National Bank*, 97 U. S., 80.

The real contest in this case was as to defendant's knowledge of the bankrupt's insolvency at the time the preference was taken, and as there is conflicting testimony on this question in the record, we are inclined to think that the instruction may have misled the jury to defendant's damage.

It is therefore recommended that the judgment of the district court be reversed and the cause remanded.

HASTINGS and AMES, CC., concur.

REVERSED AND REMANDED.

AMANDA M. WILLIAMS V. ISAAC SHEPHERDSON ET AL.

FILED JUNE 3, 1903. No. 12,871.

Commissioner's opinion. Department No. 1.

1. **Ejectment:** ADVERSE POSSESSION: EVIDENCE SUFFICIENT. Evidence held to be sufficient to sustain general finding for defendant on each of the two defenses disclosed in the evidence.
2. **Trial:** INSTRUCTION WITHDRAWING DEFENSE: VERDICT GENERAL: PREJUDICE: APPEAL AND ERROR. An instruction whose effect, as claimed by plaintiff, was to withdraw one of these defenses from the jury, could not prejudice the plaintiff nor, upon a general verdict for defendant on both defenses, does it enable the reviewing court to say the verdict is contrary to instructions.
3. **Adverse Possession:** KNOWLEDGE OF OWNER: INSTRUCTIONS: EJECTMENT. An instruction that requires defendant's possession, in order to be adverse, to be such as "will bring to the knowledge of

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the real owner the fact that the one in possession is claiming ownership" held properly refused.

4. **Adverse Possession: ELEMENTS: TACKING: INSTRUCTIONS.** It is not necessary to restate all the elements of adverse possession in telling the jury that the period of such possession of defendant may be tacked to that of his grantors to make up the statutory time.
5. **Trial: INSTRUCTIONS: CONSTRUED TOGETHER.** Instructions, and parts of instructions, unless distinctly incompatible with each other, are to be taken together and construed as a whole.
6. **Adverse Possession: BOUNDARIES, MISTAKE AS TO: INSTRUCTIONS.** It is not necessary, in telling the jury that a holding under a mistake as to the true boundary may be adverse, to set forth all the necessary elements of adverse possession.

ERROR from the district court for Franklin county.
Tried below before ADAMS, J. *Affirmed.*

A. H. Byrum, for plaintiff in error.

If the true boundary is not known or claimed to be known by the holder and by mistake or otherwise he takes possession of property belonging to another, only claiming in accordance with the true line or the original government survey, such a holding will not come under the law of adverse possession, and will not maintain title. *Winn v. Abeles*, 35 Kan., 85; *Bliss v. Johnson*, 94 N. Y., 235; *Potts v. Coleman*, 67 Ala., 221; *Thompson v. Felton*, 54 Cal., 547; *Houx v. Batteen*, 68 Mo., 84; *Devyr v. Schaefer*, 55 N. Y., 446; *Irvine v. Adler*, 44 Cal., 559; *White v. Hopenman*, 43 Mich., 267; *Abbott v. Abbott*, 51 Me., 575; *Ricker v. Hibbard*, 73 Me., 105; *Brown v. Cockerall*, 33 Ala., 38; *Enfield v. Day*, 7 N. H., 457; *Riley v. Griffin*, 16 Ga., 141; *Smith v. Hitchcock*, 38 Neb., 104; *Lantry v. Wolff*, 49 Neb., 374. Therefore the defendant Shepherdson is estopped from claiming land in dispute by adverse possession, as he, himself, had not held the land ten years at the time of the commencement of this suit, and his grantors, not having claimed more land than was described in their several deeds and not having claimed any fixed line except in accordance with the government survey when that

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should be established, there is nothing on which he can "tack" coming from his grantors to make up the required statutory time. *Lantry v. Wolff*, 49 Neb., 374; *Murray v. Romine*, 60 Neb., 94.

J. P. A. Black, contra.

The questions of adverse possession involved in this case are settled in favor of defendant in error in the following cases: *Levy v. Yerga*, 25 Neb., 764; *Obernalte v. Edgar*, 28 Neb., 70; *Ballard v. Hansen*, 33 Neb., at page 864; *Hoffine v. Ewings*, 60 Neb., 729; *Baty v. Elrod*, 66 Neb., 735.

HASTINGS, C.

This was an action in ejectment brought to recover an oblong piece of land along the south side of lot 5 and the southwest quarter of the northwest quarter of section 5, township 1, range 13 west in Franklin county; 318 feet across at the west end and 172 feet at the east end, together with rents and profits for three years, alleged to be \$210. The answer was a general denial. The petition alleged that the plaintiff was the owner of the subdivisions named and that the oblong piece of land was a part of them. The jury returned a general verdict for the defendant and the plaintiff brings error under sixteen assignments.

The evidence introduced shows the ownership by plaintiff of the three government subdivisions named in her petition and a claim on her part that this strip of land, which is in the possession of the defendant, was a part of these subdivisions. The defendant is the owner of the premises lying directly south of those claimed by plaintiff and two defenses are relied upon. First, that the line of the government subdivisions as originally established, corresponds with the defendant's holding, and second, that, in any event, defendant and his grantors had been in open, notorious, exclusive and adverse possession of this

strip under claim of title for more than ten years at the time of the commencement of this action.

The first error claimed is that the verdict is not sustained by the evidence and is contrary to it. This is on the ground, first, that defendant's possession has only lasted less than three years and the possession of defendant's grantors was not adverse or under any absolute claim of title, but only provisional, a claim of right if it should be found that the line had not been correctly located; and second, that the evidence conclusively shows the location of the government corner and line of the subdivisions as plaintiff claims.

Of course, the general verdict for the defendant determines both grounds in defendant's favor. There were no special findings and no objection is now urged to the manner of submitting the question of the location of the government corner and the true subdivision line, but it is urged that there was error in the manner of submission of the question as to adverse possession, both in the rejection of instructions asked by plaintiff and in the giving of those under which the jury acted. The verdict being general, of course, error in submitting either of the questions would vitiate it, provided these questions really are raised by the evidence. Defendant on the other hand claims that plaintiff's proof of a mistake in the government corner is entirely inconclusive and that there was no error in submitting the question as to adverse possession, at least none prejudicial to the plaintiff, and that as to both questions, it is a case of finding upon conflicting evidence.

The first question to be determined is whether the evidence on the part of plaintiff is conclusive as to the original location of the line. The county surveyor says he made two surveys, one before and one after he became county surveyor. In making the latter he went south to the quarter corner between sections 17 and 18. He found there what he took to be an established corner. From there north his measurements gave the corner of sections

17 and 18 substantially as neighboring owners had located it. A half mile north of this he found what he considered a government quarter corner between 7 and 8. A half mile further north he could find no established corner of those sections and of 5 and 6. At eighty chains and four links north of the point where he identified the quarter corner between 7 and 8, he found what he identified as the quarter corner between 5 and 6, the point in dispute. He described it as "some small pieces of white stone on top of the ground and scattered along in the wagon rut." "Under what seemed to be the central part of it, I dug down in the ground and I found some of it down there, some lumps perhaps an inch square, and some of it pulverized and it was down in the ground some little distance, perhaps three inches. It had the appearance of an ordinary corner just as we find plenty of corners in the country, they are nearly all destroyed; that is all I found at that exact point; somebody picked up a larger stone near by. I would suppose it was six inches by seven or something like that, perhaps not quite so big, that had some marks on it. I examined it and I was of the opinion it was a part of the old corner. * * * Where the government set a stone it is usually a soft stone; it is white, what they call white magnesia, and the weather usually melts them down or pulverizes them; they won't stand the weather, they decay and fall to pieces and the only thing that is left of them is what is in the ground. Sometimes you will find a little pile of stone on top and digging down you will find the form of the old stone under it. I will say in this case down there the form of the old stone wasn't discovered; sometimes we find that form and sometimes we don't. It is nearly always some of the stone in the ground and some on top, and that on top you can hardly distinguish from any other stone thrown down. Some of the corners are better than that and some are worse. I was satisfied from its appearance that it was a government corner."

From this point north to the Republican river he found

the distance some six rods shorter than that given by the notes of the government survey. This is substantially all of this witness's testimony except as to copies of government notes which indicate a distance of eighty chains and two links between the quarter corner between 7 and 8 and the one between 5 and 6 for which he was searching.

This survey was made in 1897. At that time one Frederick Bohrer was in possession of the premises. The husband of the plaintiff says that he told Mr. Bohrer about the survey and the latter was not satisfied with it; that he told Mr. Bohrer that the latter was occupying some of plaintiff's land and he wanted to put a fence on the line as plaintiff claimed it; Bohrer objected until he could have time to get it resurveyed, and a notice was served on Bohrer to vacate. That subsequently as plaintiff's agent he visited Bohrer, told the latter that plaintiff was inclined to have the matter settled up peaceably and quietly and that she wanted only what belonged to her. "Well, he said, he didn't either and he agreed with me that way, and he said, if that was the government corner he was willing to abide by it." "I told him I intended to put my fence there and if he did not vacate peaceably I was going to put my fence through there. He told me I could not put it through there while he was alive."

The witness testifies substantially as did Mr. Ashby in reference to the finding of some particles of rock at the point which they took to be the corner. He says there might have been altogether a quart of it; he says he himself picked up the piece of stone which Mr. Ashby thinks was marked, and that it was not as large as Mr. Ashby indicated. Mr. Clow, a chainman, says that there was perhaps as much of the pulverized rock as you could hold in one hand. These three witnesses are all that were produced by the plaintiff. The respective holdings and chain of title are stipulated, so that the sole points in dispute are the boundary line and the question of adverse possession.

On behalf of the defendant, Daniel Fuller testified to an

acquaintance with this land since 1874; that he lived for a number of years following 1874 on the southwest quarter of section 4, a half mile to the east of the defendant's place; he testified that in the early years of his residence in that vicinity he was largely employed in tracing lines and finding government corners. Mr. Fuller says that in the spring of 1874 he was building a house and had to cross the Republican river at a ford near this disputed corner and passed frequently within a very few rods of the corner stone, which was easily seen; that it was quite prominent and a "nice corner"; that it was situated in a spot of alkali in short grass; he thinks the stone remained till within the last ten or twelve years; this witness says that subsequently a road was laid out east and west which ran directly over this rock; he says that the corner, as located by the surveyor, is some eighteen rods south of the place of this stone as he found and recognized it in 1874; he says it was a kind of flint stone, easily broken with a hammer, but not magnesia.

A. B. Stevens has lived for thirty years on the adjoining section north, 32-2-13; he has known the premises since 1871 and knows of a stone which was supposed to be the quarter section stone on the line between sections 5 and 6; that he was chainman for Mr. Ashby as county surveyor in the laying out of a road along the half-section line east and west through section 5. He says that the stone was then plain and was in the center of the road as laid out at about the point claimed by defendant.

S. M. Banks testifies that in the year 1888 he was employed by the plaintiff's husband to break a fire-guard along the south line of plaintiff's land; the witness and plaintiff's husband found the line by locating the quarter corners to the east and setting stakes along a straight line through; that he then measured two rods to the north to leave a road and then broke a fire-guard two rods wide, intending to have it one rod in the plaintiff's land and one rod in the road as they then supposed; he testified that subsequently in the same year, after a prairie fire, he

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asked by plaintiff is not well taken. Aside from the fact that other instructions which were given fully informed the jury that adverse possession must be "absolute and notorious and under claim of right and continuous for ten years" to establish title, this instruction told the jury that it must be "such a possession as will bring to the knowledge of the real owner the fact that one in possession is claiming ownership of the land." It seems clear that this requires too much. It is not necessary that the holding be such as "will bring" to the owner's knowledge the fact of an adverse holding. It is sufficient if it be such as should be presumed to do so in the exercise of reasonable care and diligence on his part.

The complaint as to instruction No. 3 asked by defendant is not well taken. It told the jury that, to constitute adverse possession for the necessary period, ten years' holding by one person was not necessary; that it was sufficient if defendant and those from whom he held had been continuously in such possession for the full time. It is objected that this instruction defined none of the requisites to make the possession adverse. It does not pretend to do so. The necessary requirements to render a holding adverse had been fully given in other instructions. It was not necessary to repeat them in telling the jury that defendant's possession and that of his predecessors in the title might be joined to make up the ten years.

The seventh instruction is complained of because its first paragraph told the jury that "open, notorious, exclusive, adverse possession for ten years by one claiming ownership would give title to real estate, and did not require it to be 'continuous.'" The second paragraph of the same instruction told the jury if they found defendant and his grantors had been in open possession, claiming title "continuously" for ten years before the commencement of the action, they should find for defendant. This is objected to as not requiring the possession to be notorious and exclusive. It seems clear that the instruction must be taken as a whole and in connection with the

Hitchcock v. Gothenburg Water Power & Irrigation Co.

all that was necessary to the defendant's grantors holding the strip "adversely" could not be prejudicial to plaintiff.

It is recommended that the judgment of the district court be affirmed.

OLDHAM and AMES, CC., concur.

AFFIRMED.

HUGH HITCHCOCK ET AL. V. THE GOTHENBURG WATER
POWER AND IRRIGATION COMPANY.

FILED JUNE 3, 1903. No. 12,875.

Commissioner's opinion. Department No. 1.

1. **Fraud: DECEIT: WARRANTY: DISTINCTIONS.** An action of deceit is an action separate and distinct in its nature from an action for a breach of warranty and it will lie in cases where there is a warranty as well as where there is none.
2. **Fraud: FALSE REPRESENTATIONS: KNOWLEDGE OF FALSITY.** In an action for false representations, it is not necessary to prove that defendant actually knew the representations to be false at the time he made them. It is sufficient if the representations were in fact false and plaintiff relied upon them as being true to his damage.
3. **Fraud: FALSE REPRESENTATIONS: INSTRUCTIONS CRITICISED: PREJUDICE.** Instructions criticised, but *held* not prejudicial.
4. **Fraud: FALSE REPRESENTATIONS: EVIDENCE SUFFICIENT.** Evidence examined, and *held* sufficient to sustain the judgment.

ERROR from the district court for Dawson county.
Tried below before SULLIVAN, J. *Affirmed.*

Wilcox & Halligan, for plaintiffs in error.

When a bill of sale is given in the transfer of personal property, no other or different warranty can be proven than the one expressed in the bill of sale, it being the theory of the law, that all matters and negotiations leading up to the sale are crystallized in the contract and that the parties placed in the writing all matters that were relied upon by the one and represented and guaranteed by

E. C. Calkins, contra.

An action of deceit lies as well where there is an express warranty as where there is none. *Bull v. Pratt*, 1 Conn., 342; *Manes v. Kenyon*, 18 Ga., 291; *Phelan v. Kuhn*, 51 Ill. App., 644; *Merrill v. Newton*, 109 Mich., 249; *Gwinther v. Gerding*, 40 Tenn., 197; *Monell v. Colden*, 13 Johns. [N. Y.], 395; *Bostwick v. Lewis*, 1 Day [Conn.], 250; *Wardell v. Fosdick*, 13 Johns. [N. Y.], 325; *Ward v. Wiman*, 17 Wend. [N. Y.], 193.

OLDHAM, C.

The plaintiff in the court below by its agent purchased from the defendants 306 head of cows and 113 head of suckling calves, for the sum of \$10,300, on August 7, 1899. After the purchase of the cattle, plaintiff in the court below filed its petition alleging two causes of action against the defendants; one cause being for fraudulent representations as to the age, health and condition of the cattle made to plaintiff's agent by the defendants, on which it relied as an inducement to make the purchase; the other cause of action was for an alleged breach of a verbal warranty as to the age, health and condition of the cattle. The petition clearly stated two separate and distinct causes of action, but it was not assailed on this ground by the defendants until the testimony in the case had closed. When objection was raised, the court compelled the plaintiff to elect on which cause it would proceed. This it did without objection, and the cause was submitted on the allegations of fraud and deceit. At the close of the trial it appears to have been discovered for the first time that at the time of the purchase of these cattle, defendants had made and delivered a bill of sale to plaintiff's agent. The bill of sale simply recites the consideration, the description of the cattle by ages, marks and brands, and contains the following guaranty and no other: "And I do guarantee good and perfect title to purchaser." When this bill of sale was introduced, defend-

authorities are uniform in holding that an action of deceit is an action separate and distinct in its nature from an action for breach of warranty, and that it lies in cases where there is a warranty as well as where there is none. *Wardell v. Fosdick*, 13 Johns. [N. Y.], 325; *Ward v. Wiman*, 17 Wend. [N. Y.], 193; *Daly v. Bernstein*, 6 N. M., 380, 28 Pac. Rep., 764; *Merrill v. Newton*, 109 Mich., 249, 67 N. W. Rep., 120.

The alleged false representations on which plaintiff grounded its cause of action for deceit were representations as to the age of the cattle; *i. e.*, that the cattle were in fact of the ages set out in their description in the bill of sale; and also as to the number of cows that would have calves by October 1, 1899, and as to the fact that the cattle were in a healthy condition. Plaintiff's testimony tended to show that many of the cattle were very much older than represented, and that at the time the cattle were purchased a very large number of the cows which had been represented in a condition to drop calves by October 1 were not with calf at all, and that a large number of the cattle at the time of the purchase were afflicted with a disease known as the "Texas itch"; that plaintiff's agent, Allen, who made the purchase of the cattle, was without any experience in the cattle business and so informed defendants at the time the purchase was made and took the cattle relying solely on the representations as to age, condition and health made by the defendants. This testimony, we think, tended to establish a good cause of action for deceit.

Objection is urged to the fourth paragraph of the instructions given by the court on its own motion, as follows:

"Before plaintiff can recover in this action, it must establish by a preponderance of the evidence, as to one or all of its first three claims as explained in the foregoing instruction: First, that the representation or representations as charged in the petition were made by Hitchcock to Allen. Second, that the representations were false.

in substance, that in estimating plaintiff's damages they should deduct the actual value of the cattle in the condition in which they were received from the purchase price of the cattle, instead of telling them that they should deduct the price of the cattle in the condition in which they were received from the actual value of the cattle as they were represented. It is true that the instruction is technically erroneous in telling the jury to make the deduction from the price paid for the cattle instead of from the actual value of the cattle as represented, but plaintiff in its petition alleged that if the cattle had been as represented they would have been of the actual value of the purchase price, and defendants in their answer alleged that the cattle were of the actual value of \$10,300, or the purchase price; consequently, the purchase price of the cattle was conceded by each of the parties to be the actual value of the cattle in the condition as represented, and hence the instruction, while technically erroneous, was not prejudicial. It is further objected that the instruction did not state the rule for estimating damages as clearly and precisely as it should have done, and that it might have confused the jury. While we do not regard the instruction as a model, yet it announces no wrong or vicious principle and plaintiffs in error made no request for a clearer and more precise instruction on this question, and for that reason are not in a position to complain of the charge as given.

It is finally claimed that there is not sufficient evidence to sustain an allegation for substantial damages on account of the cattle being afflicted with the "Texas itch," and on account of the fact that many of the cows were not with calf, as represented, and that these two elements should not have been submitted to the jury. We have examined the testimony and find that there was competent evidence on which to base a judgment for substantial damages on each of these charges. In fact the testimony offered by plaintiff was sufficient to sustain a much larger claim of damages than that awarded by the jury.

treasurer because the three lots were taxed together in a gross sum. In 1893 the three lots were sold for the sum of \$17.25 delinquent taxes and all included in the same sale certificate to W. J. Gow. Subsequently the sale certificate was indorsed to C. B. Smith and by him to George and John Christie, the owners of the mortgage, and subsequently by them to the plaintiff, George Christie. In 1897 George and John Christie by foreclosure proceedings obtained title to lots 323 and 324, covered by their mortgage. They then redeemed those two lots, or at least had the treasurer mark them redeemed on the tax sale books and on the certificate of sale. The latter was marked "all redeemed except lot 322." The certificate was assigned to plaintiff, who commenced this proceeding to foreclose as to lot 322. His petition was met by a demurrer, which was overruled.

The defendants Hartzell and Main then answered, admitting the allegation of ownership of the real estate; denied the rest of the allegations of the petition and denied that the property was assessed as alleged in the petition. They alleged that the action was not taken within five years from the date of the sale and therefore barred; that in the foreclosure of the mortgage the taxes were included and were merged in the decree in that action.

Plaintiff's petition sets out that lot 322 was assessed at a certain sum for each of the years for which taxes are claimed, and that taxes to a certain amount were levied upon it. The evidence produced at the trial disclosed, as before stated, that the lots were all assessed together during these years and that the apportionment was made at the time of the so-called redemption of lots 323 and 324 on the basis of the subsequently made valuation.

The defendants and appellees claim that this does not show an assessment of this particular lot which can be the foundation of any recovery. The allegations of the assessment and levy were denied as before stated, and it is clear that the proof does not support them.

DUFFIE, C.

James K. Lane, the defendant in error, brought this action in the district court for Saline county to recover from plaintiffs in error possession of certain lots in Lane's first addition to the town of Pleasant Hill, and for rents and profits in the sum of \$50. At the same time there was pending in said court a case entitled "Coates v. Abbott," and on March 9, 1897, a stipulation was entered in this case in the following words:

"In District Court of Saline County.

"JAMES K. LANE v. EZRA S. ABBOTT AND ELIZA A. ABBOTT.	}	Stipulation.
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"It is stipulated and agreed by the parties to this action in open court, in consideration of the facts that the issues and the evidence proper to sustain the issues in this case, are identical with those in the case of Coates v. Abbott, now on trial to the court and jury, save only as to the name of plaintiff and description of property, that a trial by jury herein be and hereby is waived, and that the court shall enter judgment in this case for plaintiff herein upon his petition, if in that case plaintiff by the determination of this court, and of the supreme court in event that case be taken to the supreme court, finally recover judgment therein; that the court shall render judgment for the defendants if similar judgment be entered in that case for defendants, but that this court shall not enter judgment herein for either party until the case of Coates v. Abbott be finally determined in this or in supreme court if taken hence, when this court shall enter judgment herein, which shall be final between the parties hereto, their heirs and assigns.

"JAMES K. LANE, *Plaintiff*,

"By HASTINGS & SANDS, *His Att'ys*.

"E. S. ABBOTT, *for Defendant*.

"Dated March 9, 1897.

"CHAS. L. HALL, *Judge*."

plied with and makes a *prima facie* case for the defendant in error. On the oral argument exception was taken to the allowance of \$50 for rents and profits. In the case of *Abbott v. Coates* it does not appear that any amount for rents and profits was allowed, and the bill of exceptions does not show that any evidence was taken in this case upon that question, but the same general rules are applicable to the construction of the stipulation made between the parties as to other agreements. We must consider the subject-matter of the contract and the surrounding circumstances with a view of ascertaining the purpose and intent of the parties. We are also to assume that they made this stipulation in good faith and for the object of avoiding the expense of a trial. In this view of the case it is plain that the parties intended that the *Coates Case* should govern this; that a decision upon the merits had in that case would dispose of every matter in this one; that if the *Coates Case* was decided in favor of the plaintiff, judgment should be entered for the plaintiff in this case upon the cause of action stated in his petition. That cause of action was for the recovery of certain lots and the rents and profits thereon while in the defendant's possession. The *Coates Case* was determined upon the merits and the plaintiff succeeded except as to two lots inadvertently included in the deed and which as a matter of fact were not a subject of controversy. In our opinion the district court has fairly construed this stipulation and entered the judgment contemplated by the parties at the time it was made.

It is therefore recommended that the judgment of the district court be affirmed.

POUND and KIRKPATRICK, CC., concur.

AFFIRMED.

ascertained. It was further replied that there had been a similar contract between the parties for the cultivation of the same land for a previous year, in which it had been expressly stipulated that the quantity of corn deliverable under it should be ascertained by weight and that it was so ascertained. And finally it was pleaded that the corn delivered under the contract in suit "was immature, green, wet and not in good condition and not properly husked," but it was not averred that the plaintiff had suffered any damages by reason of these facts, or that they constituted any breach of the contract by the defendant, except it was said that there were foreign substances among the corn rendering the ascertainment of its quantity by measurement difficult or impracticable and unreasonable.

On motion these allegations were stricken from the reply, and a trial having resulted in a judgment for the defendant the plaintiff prosecutes error from the ruling on the motion.

There is no other question in the case, and we think this must be decided in favor of the defendant in error. It will be observed that the only question at issue was whether the requisite quantity of corn had been delivered, not the method by which that quantity was best and most accurately ascertainable.

It is unnecessary to discuss at length whether the matters pleaded in, and stricken from, the reply, were, if true, admissible in evidence in response to the defendant's answer of performance. If they were so, they were matters of evidence only which, it is a truism to say, should not be pleaded. The answer contains no issuable new matter and it is only in those cases in which it does contain such, that new matter is pleadable in a reply. In any other case new matter in a reply must be either evidence merely, or else it must be inconsistent with the petition, or bring forward subjects connected with a new and independent cause of action, all of which things are foreign to the office of the pleading. In short, new matter is admissible in a reply only to meet and refute or to confess and avoid

troversy has been fully considered and discussed in *Chicago, B. & Q. R. Co. v. County of Custer*, — Neb., —, 95 N. W. Rep., 860, and is in harmony with the conclusion reached in that case.

It is therefore recommended that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

HARRIS FRANKLIN & COMPANY v. L. N. LAYPORT, SHERIFF
OF CHERRY COUNTY, NEBRASKA, ET AL.

HARRIS FRANKLIN & COMPANY v. J. E. THACKERY, COUNTY
TREASURER OF CHERRY COUNTY, NEBRASKA.

FILED JUNE 18, 1903. Nos. 12,764, 12,765.

Commissioner's opinion. Department No. 1.

Taxation: ASSESSMENT AGAINST SUBSEQUENT OWNER: ENFORCEMENT OF LIEN. Where personal property has been held out as belonging to a non-resident person or corporation, with the owner's and the other party's knowledge and consent, if, while the treasurer has the tax list and warrant for the collection of the tax, the person to whom it was assessed becomes the owner, the lien of the taxes will attach to the property and may be enforced against a purchaser.

ERROR from the district court for Cherry county. Tried below before WESTOVER, J. *Affirmed.*

F. M. Walcott and *M. F. Harrington*, for plaintiff in error.

A. M. Morrissey and *E. D. Clarke*, contra.

HASTINGS, C.

These are replevin actions brought to recover steers which are alleged to be the property of the plaintiff company. The ordinary petitions and affidavits in replevin were filed in both actions. The defendant sheriff and the

precincts, were led to believe and did believe that the cattle were the property of Harris Franklin, and of Harris Franklin & Co., and the assessors assessed them in Harris Franklin's name, and in the name of Harris Franklin & Co., and the tax list of Cherry county for the year 1900 was delivered to the treasurer September 29, 1900; that the cattle replevied are some of the cattle so listed; that in July the whole herd of cattle was sold to Harris Franklin by the Arden Land & Cattle Company; that before they were levied upon they were sold to Harris Franklin & Co., and at the commencement of the action the plaintiff company was the owner of the cattle subject to any lien held by the defendants; that Harris Franklin & Co. made demand for return of the cattle, and that they were not taken under any execution or on any order or judgment, or for the payment of any tax, fine or amercement, or by virtue of any order of delivery or replevin or on other *mesne* or final process against the plaintiff; that Harris Franklin was the president and manager of the Arden Land & Cattle Company, and is the president and manager of the plaintiff company; that the defendants were holding the property under a levy and it had never been released, and the amount charged as taxes was agreed upon. It was agreed that the defendants were the county treasurer and sheriff, and that plaintiff is a corporation organized under the laws of South Dakota by the name of Harris Franklin & Co., and is incorporated, and during all of the time involved Harris Franklin was a resident of South Dakota. From depositions it appears that a herd of cattle was contracted to be fed during the winter of 1899 and 1900 by Harris Franklin in Cherry county, who was president and managing officer of the Arden Land & Cattle Company; the cattle were shipped to the point where they were to be kept and the contract provided that they were to be delivered from and to the railroad company; the cattle seem to have been from Texas and South Dakota. It seems that one Appel was the general agent, looking after the placing of these cattle and

such keeping were paid by checks signed by Harris Franklin; the whole business was conducted in Harris Franklin's name, and, as the stipulation says, the parties in possession of the cattle were "led to believe" that it was the property of Harris Franklin and of Harris Franklin & Co. Section 10, article 1, chapter 77, Compiled Statutes of Nebraska, required live stock in herds or not connected with a farm to be listed where it might be on April 1. Section 7 provides for the listing of all personal property controlled by any person as agent or attorney. It appears that this property was handled and controlled by the persons in whose charge it was as the property of Harris Franklin and of Harris Franklin & Co., with the knowledge and consent of the owners, the Arden Land & Cattle Company. That being so, it would seem that the Arden Land & Cattle Company is not at liberty, after the taxes have been assessed in the name of the person whom it held out to be the owner, to now say that the tax is void because not assessed against the right party. Is this plaintiff in any better position? Evidently not. It has the same president and managing officer as had the Arden Land & Cattle Company. It got the property after the lien of these taxes accrued, and from the person against whom the taxes are charged, and is itself, as we think, chargeable with them.

Plaintiff in error claims that the cattle were assessed without consultation with either the owner or his agents; but there is nothing in the stipulation to indicate that the property was not duly listed in accordance with the statute, by the person in whose possession it was, in the utmost good faith that it was Harris Franklin's and Harris Franklin & Co.'s. There is nothing to indicate that ample notice of the assessment was not given to the parties in possession, and in the absence of any proof to the contrary such proper action by the assessing officer must be presumed. That the Arden Land & Cattle Company, or its managing officer, who became the purchaser of the property, did not actually learn of the assessment, would not seem to be material.

into an agreement by the terms of which Cathers seems to have been paid \$1,500 in cash, and to have received a mortgage for \$1,160 upon the property in controversy herein, in consideration of which he executed a paper in the nature of a receipt and agreement acknowledging payment in full of all claims for attorney's fees up to that date, and providing for the release and satisfaction of the judgment hereinbefore mentioned, upon which there was unpaid at that time some \$2,600. The Lintons were not residents of the state of Nebraska at that time, and Cathers seems to have been their attorney in looking after their business in this state for many years, and appears to have been paid by them a very large sum of money as attorney's fees, an amount, it is contended, something like \$20,000. Subsequently Cathers procured the issuance of an execution or order of sale upon the judgment which he had agreed to satisfy, and levied the same upon certain lots in Argyle, an addition to the city of Omaha, the same property covered by the mortgage which the Lintons had executed to Cathers for \$1,160 in settlement of the judgment first mentioned. It is disclosed that on April 29, 1902, the property was sold by the sheriff under the order of sale. Shortly before this it seems that John O. Yeiser had been employed by the Lintons as their attorney, but he had no knowledge of this proceeding to collect the judgment mentioned until about the time of the sale. When he learned of the sale, he filed objections to the confirmation thereof on the ground, among others stated, that the judgment had been fully paid and satisfied. No proof seems to have been offered in support of these objections. About this time Yeiser was called away from Omaha to take depositions in another case of the Lintons, and notified the trial court that he was going to be absent, and asked to have all matters in which he was interested passed until his return. On May 10, 1902, the trial court took up the motion for confirmation of sale in the absence of Yeiser or any attorney representing the Lintons, seemingly having overlooked the fact of the arrangement to

and recorded a deed of disaffirmance of her title to the lots described in the mortgage, which would place the title to the lots back in John Borland Finlay, father of Mrs. Linton. In answer to this the Lintons claimed that Mrs. Linton was the only child and sole heir of J. B. Finlay, that he had died intestate the owner of the lots in question, and that Mrs. Linton, being the sole heir, was the owner in fee of the lots; and that she simply desired to hold the lands by descent, rather than under the deed by which her father had conveyed the lots to her; and that the deed of disaffirmance had been drawn up in Cathers' office, and that he had full knowledge of these matters. A large amount of evidence in the way of affidavits and records was introduced and considered by the trial court, finally resulting in the overruling of the motion by the Lintons to vacate the order of confirmation.

Defendant in error objects to the consideration of the questions presented by briefs of plaintiffs in error because no motion for a new trial was filed by the Lintons and passed on by the trial court. This objection seems not to be well taken. The rule is well settled in this state that no motion for a new trial is necessary to present for consideration in this court the correctness of the action of the trial court in passing upon a motion such as that in the case at bar. The rule seems to be elementary, and no authorities need be cited in support thereof.

While it would seem to be a very unsatisfactory way to try a question such as that presented in the trial court in the case at bar upon affidavits, yet the testimony so offered seems to establish quite conclusively that the judgment upon which the sale was made had been in fact fully paid at the time the execution was issued, and that the agreement made by Cathers to satisfy the same was upon a good and sufficient consideration, and was intended to be a full satisfaction of the judgment. This being true, it would seem that the motion of plaintiffs in error should have been sustained. It was made and heard at the same term at which the order of confirmation had

tain tract of land by adverse possession. The district court found that he had not, and rendered a judgment accordingly, from which the plaintiff appeals.

It is not insisted that the trial judge misconceived the nature of the issue or committed any serious error in the admission or rejection of evidence, but it is contended that he erred in determining its force and preponderance. For the purpose of satisfying our own minds with respect to this inquiry, we have carefully examined the record and the brief of counsel for appellant, both of which are somewhat voluminous, and are unconvinced that appellant's contention ought not to be upheld. Whether the plaintiff's possession was continually adverse for the period of limitations, is to be decided after a consideration of a great number of circumstances and transactions, to set forth which intelligibly in this opinion would require little less than a comprehensive abstract of the bill of exceptions. If such a service in such cases should be required of this court, it is not too much to say that the wheels of justice would be effectually clogged.

It seems that the first occupants of the premises in controversy were one Louis C. Lamoreaux and his wife, and that after the death of the former, his widow, Sophia, by a memorandum in writing transferred her possession and rights, whatever they were, to one Christen Nelson for the benefit, it is said, of one Andrew Johnson, who in December, 1889, assigned all his "right, title and interest" in the document to one Ambery Bates who went into possession of the premises. The plaintiff claims to have succeeded to the possession of Bates, which he asserts to have been continuous, exclusive and adverse, but in March, 1896, Bates having died, the plaintiff, as administrator of his estate, procured a license from the district court of the county to sell the estate of the decedent in the premises, which he described in his petition in that proceeding as being the dower interest of Mrs. Lamoreaux therein. It is under a sale and deed made pursuant to a license so procured that the plaintiff now claims to hold as grantee of the purchaser at the sale.

or offered to return, the goods; and an answer which falls to allege such a rescission and return or tender, does not state a defense.

3. **Issues: ON APPEAL: PLEADING NEW DEFENSE: RESCISSION** Where the defense of rescission is not contained in the answer on which a cause is tried in the county court, on a motion for that purpose, such defense should be stricken from the answer in the district court.
4. **Issues: ON APPEAL: PLEADING STATES NO DEFENSE: DIRECTING VERDICT.** If the answer, when thus reformed, does not state a defense, it is proper for the court to direct a verdict for the plaintiff.

ERROR from the district court for Douglas county. Tried below before ESTELLE, J. *Affirmed.*

Baldrige & De Bord, for plaintiff in error.

The court erred in instructing the jury to render a verdict for plaintiff below. The rule is that in all cases where there is either expressed or implied warranty, the vendee may show a partial failure of consideration in the defense of an action against him for the purchase money, without returning the goods. *Brantley v. Thomas*, 73 Am. Dec. [Tex.], 264; *McConnell v. Lewis*, 58 Neb., 188; 1 Parsons, Contracts, 473, 474; *Rutter v. Blake*, 3 Am. Dec. [Md.], 550.

Crane & Boucher, contra.

The court did not err in directing a verdict for plaintiff below. *Hazen v. Wilhelmie*, — Neb., —, 93 N. W. Rep., 920; *Roman v. Bressler*, 32 Neb., 240; *McCormick Harvesting Machine Co. v. Martin*, 32 Neb., at page 726; *Moline, Milburn & Stoddard Co. v. Perea*, 52 Neb., 577; *Harcus & Co. v. Grand Island Light & Fuel Co.*, 41 Neb., 153; Newmark, Sales, section 266; *Silurian Mineral Springs v. Kuhn*, 65 Neb., 646; *Rood v. Taft*, 94 Wis., 380.

BARNES, C.

This action was commenced in the county court of Douglas county, by Henry A. Fry & Co., against the Sloan Commission Company, to recover the price of a

Plantation Java Coffee whole bean, at thirty cents per pound, and that in consideration thereof the said plaintiff was to allow the said defendant a rebate of three cents per pound, and gave to the defendant the exclusive agency for Omaha and South Omaha for the selling of the goods and the merchandise.

"That the said agreement was signed in writing by said parties to this suit, and that the said defendant was employed by the plaintiff as its agent to sell for it, its said merchandise in the city of Omaha and South Omaha, and that whatever should be sold by the defendant should be for and on behalf of the plaintiff.

"That relying upon said order and said contract of agency the said plaintiff shipped to the said defendant and the said defendant received from the plaintiff twenty-two hundred and fifty pounds of coffee for and on behalf of the divers persons to whom the plaintiff through its agent had sold said merchandise.

"Defendant further alleges that at the time said merchandise was sold, being the same merchandise referred to in the petition, the said plaintiff warranted, to the defendant and to the divers retail merchants of Omaha to whom said merchandise was sold, the coffee berries referred to in said petition, to be sound and every one to be perfect, whole, clean, and to have all dirt removed therefrom. And at said time plaintiff showed to defendant and to said divers retail merchants a sample of coffee that was clean and sound, and whole, and contained no dead berries and plaintiff warranted said coffee to be as good in every respect as said sample.

"Said plaintiff warranted that it had certain machinery expressly made and operated to make said coffee beans perfectly clean, and that any person could drink the coffee made from said beans without hurting him or in any way injuring him; and the said plaintiff further warranted said coffee beans to be the finest drinking coffee put up and marketed, and the plaintiff so warranted said berries and at and before said contract was entered into and

has only earned three cents per pound on the eight hundred and two pounds of coffee, and this defendant has been damaged in the sum of \$43.44, by reason of the failure of the plaintiff to carry out its said contract, and this sum it claims as a set-off as against the claim of the plaintiff; and this defendant has offered and hereby offers to pay the plaintiff \$216.54 the amount received for said coffee so sold less his commission, less \$25 for freight, less \$43.44, which defendant has been damaged by reason of the failure of the plaintiff to carry out its said contract, and the defendant hereby offers to confess judgment for the said sum of \$148.10.

"Further answering the defendant denies each and every allegation in said petition contained, except these allegations herein admitted to be true."

The answer in the county court is thus quoted in order to give a full understanding of the points hereinafter decided. The reply was a general denial; a trial on these issues resulted in a judgment for the plaintiff for \$148.10, from which it appealed to the district court. The petition therein was an exact copy of the one on which the case was tried in the county court. Before the trial defendant filed an amended answer, which contained a new paragraph, one not set forth in the answer in the court below, designated as No. 11, which was as follows:

"That the defendant refused to accept said coffee berries and so notified the plaintiff within ten days after the same had been received by the defendant from the plaintiff, and within said time said defendant made a tender of the same to the plaintiff, and notified the plaintiff that so much of said coffee berries as remained unsold, were on hand subject to the order of the plaintiff; and defendant requested plaintiff to accept and receive the same from the defendant, which the plaintiff refused to do; and the defendant has tendered, and hereby tenders the coffee berries on hand unsold to the plaintiff."

This paragraph was stricken from the answer on plaintiff's motion, for the reason that it was new matter of

may rescind the sale, return or offer to return the goods, and plead such rescission and tender as a complete defense to the action. 28 Am. & Eng. Ency. Law [1st ed.], 827, note 2; *Warder v. Fisher*, 48 Wis., 338; Schouler, Personal Property [3d ed.], 610-611; *Perley v. Balch*, 23 Pick. [Mass.], 282, 34 Am. Dec., 56. An examination of the answer filed in the county court, and set forth above, clearly shows that it fell far short of stating a defense to the cause of action set forth in the petition. It contained no counter-claim for damages for a breach of the warranty, and no allegation that the plaintiff had rescinded the sale by returning or offering to return the coffee. Such an allegation was absolutely necessary; without it the answer stated no defense. *Brown v. Waters*, 7 Neb., 424; *Faulkner v. Klamp*, 16 Neb., at page 178, 20 N. W. Rep., 220; *Symms v. Benner*, 31 Neb., at page 596, 48 N. W. Rep., 472; *Phenix Iron Works v. McEvony*, 47 Neb., at page 234, 53 Am. St. Rep., at page 531, 66 N. W. Rep., 290; *American Building & Loan Ass'n v. Bear*, 48 Neb., at page 457, 67 N. W. Rep., 500; and when the defense of rescission and tender of the goods was set up for the first time in the answer filed in the district court the motion to strike was properly sustained. *Darner v. Daggett*, *supra*.

2. By striking out paragraph eleven the answer was left in such a condition that it stated no defense. The rule is well established that where the answer contains no substantial defense, it is proper for the court to direct a verdict for the plaintiff. *Hrabak v. Village of Dodge*, 62 Neb., 591; *Hill v. Campbell Commission Co.*, 54 Neb., at page 63.

It is further contended that the plaintiff herein was entitled to receive a credit on the account, for its so-called commission or rebate of three cents per pound on the whole consignment of coffee, together with \$25, the amount of freight paid for its delivery at Omaha. It appears from the record that the price for which the suit was brought was twenty-seven cents per pound, while the

able brevity and clearness that we copy the same from his brief:

"This is an ordinary case of forcible entry and detainer. The defenses in the trial court were, renewal by parol of a written lease for previous year, and former adjudication.

"The evidence on the first defense was conflicting; we shall, therefore, submit the case to this court only upon the matters and things pertaining to the second defense.

"On the 19th day of April, 1901, a complaint was filed in the county court of Adams county in the usual form. In this complaint was an allegation that plaintiff therein had served notice to quit March 1, 1901. There was a trial of that action, April 24, 1901, and a judgment rendered therein, finding the defendant therein not guilty and adjudging costs against plaintiff below.

"Thereafter, May 25, 1901, another action was commenced in the same court, a new complaint being filed, which was identical with the former one save that it alleged the service of notice 'on or about May 16, 1901.'

"To this complaint an answer was filed, pleading 'not guilty' and also *res judicata*. The reply was a general denial. A trial was had to the court and judgment was rendered against the defendant therein. An appeal was prosecuted to the district court and again, upon the same issues, judgment was rendered against defendant, plaintiff in error. To reverse said judgment, plaintiff brings the case to this court. On the trial, defendant below introduced the record of the former suit. To overcome such defense, plaintiff below was allowed to show by the county judge that the decision in the former suit was based, in his mind, upon imperfect service of the notice to quit. Exceptions were taken to the admission of such evidence and to the instructions relating thereto.

"Our assignments of error cover only the questions of the admissibility of oral evidence to contradict the records of a court; allowing a trial judge to explain the reasons of his decision, when there was but a single issue involved;

service of the notice to quit required by the statute, and that in that contention, the plaintiff in error prevailed and the judgment was based upon the court's finding (not entered of record but testified to) on that question. That being his contention then, and having prevailed therein, he can not now be heard to contend that the service was good and that, therefore, the judgment was upon the merits of the cause. If A is sued by B on a matter with which C is connected and contends that the cause is joint between B and C, and prevails because C is not in, he can not claim misjoinder when sued by B and C and plead the judgment against A in bar.

Referring to the statute, we find that section 1021 of our Civil Code is, in part, as follows: "And judgments, either before the justice or in the district court, under this chapter, shall not be a bar to any after-action brought by either party." This has reference to actions of this kind. The plaintiff in error relies upon the case of *Dale v. Doddridge*, 9 Neb., 138, to sustain his contention that, notwithstanding this statute, the former judgment between these parties is a bar to this action. We think the case referred to does not go to the extent contended. It certainly did not need to go so far, and if it does, we are not willing to follow it. The syllabus in that case, upon this point, is as follows:

"The judgment of a justice of the peace, or of the district court, in proceedings in forcible entry and detainer, is conclusive in that proceeding on the matters in issue at the time of its rendition, unless such judgment is reversed or modified by proceedings in error."

The judgment offered in evidence, and not admitted at all, in that action, was one based upon the express finding of the court that the action was barred by the statute of limitation. That fact then became *res judicata*, and would estop either party in any form of action to dispute the fact so found. That fact established, would defeat a subsequent action in this form on the same cause; and the judgment and finding constituting indisputable evidence

and that, if no notice to quit is given, he is not guilty. In section 212 of the work above referred to, it is said:

"The judgment must be on the merits. If the real merits of the action are not decided in the first, the prior judgment is no bar. Generally, where questions of this kind arise, regarding the identity of the matters litigated in the former suit, parol evidence is admissible to show what transpired on the former trial in order to explain the record; and if the record shows that the same cause of action was apparently determined in the first suit it will be *prima facie*, but not conclusive, evidence that it has passed '*in rem judicatum*'; and the burden of proving that it did not, is upon the party against whom the record is used. Where the party against whom a record is sought to be used fails to offer any evidence to show that the general verdict in the prior action was not rendered upon the issue involving the merits, the judgment in the first suit, instead of being *prima facie* evidence for the party in whose favor it was rendered, is conclusive."

But if the decision of the court based upon the want of such notice is a decision of the case upon its merits, then it is because such notice is a part of the cause of action.

If judgment went against the defendant in error because of a want of an element in his cause of action as then existing, which can be supplied by the lapse of time or some subsequent action or event, and it is so supplied, his complete cause of action on the second trial is not the same as his incomplete cause of action at the time of the first trial so as to make the former judgment a bar. If judgment be rendered for a defendant in an action upon a promissory note because the note is not yet due, the judgment is no bar to an action upon the note when his right of action thereon has been completed by the flux of time.

We think the evidence of the trial judge in the former action, showing that the plaintiff in error prevailed therein only because of want of service of notice to quit, was properly admitted to show what was in fact decided in the former action, and that such evidence conclusively

DUFFIE, C.

This suit was brought by Albert J. Donahoo to recover damages from Sarah and Louis Figg on the ground that they had alienated his wife's affections and caused her to abandon him. The answer denied the allegations of the petition and, as an affirmative defense, alleged that Donahoo had abused, mistreated and beaten his wife until he had alienated her affections and driven her from home. The case was tried to a jury, resulting in a verdict against the plaintiffs in error for \$7,500, and the case is brought here for review.

The errors upon which a reversal is asked, are: 1st. That the court erred in overruling a challenge of the plaintiffs in error to one of the jurors on the ground that he had served on the jury in that court within two years. 2d. That the court erred in failing to instruct the jury upon all the material issues in the case. 3d. That the verdict is exorbitant, not sustained by the evidence, and the result of passion and prejudice.

One Jewett was a talesman called in by the sheriff after both parties had exhausted their peremptory challenges, and was the last juror called. He was challenged by the defendants on the ground that he had served upon the jury in the same court within two years prior to the time of the challenge. The case was tried at the March, 1902, term of the district court for Sarpy county, and it clearly appears, and is not controverted, that Jewett was a juror serving as a talesman at the April, 1901, term of said court. On the examination of this juror objection to his sitting in the case was made in the following language: "We want to excuse him on the ground that he served on a jury within the last two years." And again, after some further inquiries, the following objection was made: "We challenge him on the ground that he served as a talesman within two years." It is now insisted that these objections were not specific and framed in the language of the statute. We have never understood that an objection to a juror

two (2) years immediately preceding such verdict or inquest."

In *Wiseman v. Bruns*, 36 Neb., 467, this statute was brought in question under the following state of facts: One Jenal was called as a juror and in his examination on his *voir dire* stated that he had been a talesman in that court a little more than one year prior to that date. He was thereupon challenged for cause by Wiseman and the challenge overruled, to which exceptions were taken. Wiseman then exhausted his peremptory challenges and, being defeated in the case, brought the case to this court on error, alleging that his objections to the juror should have been sustained. In that case it was urged, as in the case at bar, that the juror, having served as a talesman only, did not come within the prohibition of the statute. The court said:

"It will be observed that the word 'summon' or 'summoned' is used whether the names of jurors are drawn from the box or whether called by the sheriff, and the same words are used by this court in *Dodge v. The People*, 4 Neb., 220, in speaking of talesmen brought in by the sheriff to serve as jurors. The statute has made no exceptions in favor of talesmen and we do not feel justified in making exceptions. The purpose of the statute seems to be to exclude professional jurymen, but whether so or not the language is plain and unambiguous. It is therefore a good cause of challenge to one called as a juror that he has been summoned and attended the district court as a juror at any term of court held within two years prior to the time of challenge, and this rule applies to those summoned as talesmen. The judgment is therefore reversed and the cause remanded for further proceedings."

In *Coil v. State*, 62 Neb., 15, it is said at page 20: "The right of a defendant to challenge a juror in either a civil or a criminal cause, on the ground that he has been summoned and served as such in the same court within the two preceding years, must be conceded without discussion. The right is given by the statute, has been confirmed by

This is the only instruction in which the attention of the jury is directed to the affirmative defense set up in the answer of the defendants to the effect that the plaintiff's own conduct and cruelty to his wife caused her to abandon him. Without at this time expressing any opinion upon the character or weight of the evidence offered by the defendant in support of this defense, it is sufficient to say that there was evidence tending to prove these allegations of the answer, and complaint is made that the court in its instructions did not pointedly and specifically call the attention of the jury to this phase of the case, and say to them in effect that if his own conduct was the controlling cause which induced his wife to leave him that no recovery could be had against the defendants. It has always been the rule that the charge of the court should be a clear and explicit statement of the law applicable to the facts in the case and should cover all the questions involved in the issue, and this he should do whether requested or not. *Kyd v. Cook*, 56 Neb., 71; *Milton v. State*, 6 Neb., 136; *Cunningham v. Fuller*, 35 Neb., 58; *City of Plattsmouth v. Boeck*, 32 Neb., 297; *City of Lincoln v. Beckman*, 23 Neb., 677.

Without at this time saying that the failure of the court to specifically call the attention of the jury to this affirmative defense is reversible error, it must, we think, be conceded that to do so in a proper instruction would be the more satisfactory method of submitting the case to the jury, and these observations are made for the purpose of calling the attention of the trial court to what may at least be said to be an omission in its instructions.

For the error above pointed out in overruling the objection made to the juror Jewett, it is recommended that the judgment of the district court be reversed and the case remanded for another trial.

KIRKPATRICK and POUND, CC., concur.

REVERSED AND REMANDED.

transcript was the evidence of plaintiff's attorney that he had been present at the former hearing of the case and had heard the witness testify and that J. D. Scott was the official reporter and took the testimony of all the witnesses sworn at the former trial. He then produced a transcript of the evidence of the witness, certified to by J. D. Scott, as official reporter, and purporting to contain all the evidence given by the witness. Proper objection was interposed to the introduction of the transcript by the defendant; the objection was overruled and the transcript admitted. We think this action of the trial court was erroneous. It has been held by this court that, "The law makes no provision for the certification by the shorthand reporter of the proceedings of the district court, hence a transcript of his notes, although accompanied by a formal certificate, is not admissible as independent evidence." *Smith v State*, 42 Neb., 356, 60 N. W. Rep., 585; *State v. Ambrose*, 47 Neb., at page 240, 66 N. W. Rep., 306; *German National Bank v. Leonard*, 40 Neb., at page 685, 59 N. W. Rep., 107. The evidence contained in the transcript was of a character highly prejudicial to the defendant. While it is true that other witnesses testified to substantially the same facts, yet this we do not think would necessarily cure the error in the admission of this evidence. The material facts in dispute in the controversy were as to whether the horse owned by defendant was of a dangerous and vicious disposition, and whether this fact was known by defendant at the time he requested plaintiff to go and feed his team. The evidence contained in the transcript tended to support the contention of plaintiff on each of these propositions and the mere fact that there was sufficient evidence in the record to have sustained the verdict of the jury without this additional testimony can not be urged in justification of the ruling, nor is the contention that defendant has waived his right to complain of the reading of the transcript made by the same reporter of the testimony of the defendant himself given at the former hearing. The court's action in admi!

be described with sufficient certainty to enable the officer holding the execution to identify it. Section 133, Code of Civil Procedure. When lands are demanded, the description of them in the declaration must be so certain that seisin may be delivered by the sheriff without reference to any description *dehors* the writ, and such as would enable a competent surveyor to identify the exact lands declared upon. *Lane v. Abbott*, 23 Neb., 489; *Atwood v. Atwood*, 22 Pick. [Mass.], 283; *Miller v. Miller*, 16 Pick. [Mass.], 215.

No judgment could be properly rendered on such a description as that in plaintiff's petition, and it was error to refuse to order a retrial after proper amendment. *Smith v. Price*, 7 S. W. Rep. [Ky.], 918.

H. P. Wilson, contra.

Had defendant any doubt as to the land described in the petition because of defective description or variance therein he had his right of motion to make more definite and certain. *Powers v. Powers*, 20 Neb., 529; *Kime v. Jesse*, 52 Neb., 606; *Darst v. Perfect*, 42 Neb., 574; *First Nat. Bank v. Smith*, 36 Neb., 199. Or, had he deemed it an "impossible description of any area," he might have demurred for sufficiency of facts to state a cause of action. *Powers v. Powers*, 20 Neb., 529; *Kime v. Jesse*, 52 Neb., 606.

No variance between the allegation in the pleading and the proof, is to be deemed material, unless it has actually misled the adverse party to his prejudice, in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled, thereupon the court may order the pleading to be amended upon such terms as may be just. Section 138, Code of Civil Procedure. The defendant did not suggest that he had been misled by the variance and hence if it were a variance it was the duty of the court to disregard it.

the village of Grafton in the county of Fillmore and state of Nebraska."

In addition to this description her petition contained the usual and necessary averments to sustain an action in ejectment. Cushing appeared and filed his answer, which was a general denial of the facts contained in the petition. Thereafter, when the case came on for trial before the court and jury, the defendant objected to the introduction of any evidence because the plaintiff's petition did not state facts sufficient to constitute a cause of action; the objection was overruled, the trial proceeded, and after the introduction of all of the evidence the defendant moved the court to direct a verdict in his favor; the motion was overruled, and the court upon his own motion directed the jury to return a verdict in favor of the plaintiff. The verdict returned was in the words and figures following:


"We, the jury in this case, being duly impaneled and sworn, do find and say that upon the issues joined we find the title and right of possession of the premises in controversy in the plaintiff."

A motion for a new trial was overruled, and judgment was entered on the verdict, as follows:

"It is further considered, adjudged and decreed by the court that the title in and to the premises described in the plaintiff's petition, to wit: a piece and parcel of land commencing at a point eighteen feet north of the southeast corner of lot No. 155, thence running east forty feet parallel with the south line of said lot No. 155, thence running north two feet on a line parallel with the west line of lot No. 155, thence running west forty feet on a line parallel with the south line of lot No. 155, thence south two feet on the west line of said lot No. 155 to the place of beginning; all of which is a part and parcel of lot No. 155 in the village of Grafton, county of Fillmore and state of Nebraska, he and the same hereby is declared and decreed to be vested in the plaintiff, Mary Conness; and that the plaintiff, Mary Conness, have judgment for

years prior to the commencement of this action; that shortly before that date plaintiff, for some reason, which is not disclosed, nailed up the door and refused defendant access to, and the use of, her part of said stairway, and she thereupon commenced this action. On the trial she introduced sufficient evidence to establish her title to the south twenty feet of lot 155, by *mesne* conveyances from the original patentee of the land on which the village of Grafton is situated. This evidence was introduced without valid objection on the part of the plaintiff herein, and no substantial defense was offered or made by him. He evidently relied on the defective description contained in the petition, and now contends that for such defect the judgment should be reversed. Under the evidence contained in the bill of exceptions the trial court properly instructed the jury to return a verdict for the plaintiff (defendant herein), and no other verdict could have been rendered or sustained; but the court should have required the petition to be amended so as to conform to the evidence and the facts proved on the trial. This was not done and the judgment rendered on the verdict followed the description contained in the petition. It follows that the judgment is not sustained by the evidence. If it were not the fact that the judgment carries the costs in the action which have been taxed against the plaintiff in error, we might hold, with propriety, that he was not injured or deprived of any substantial right thereby. It clearly appears from the record that he is not interested in the property described in the judgment, and that the defendant herein is not entitled to recover the possession thereof; but to the extent of requiring the plaintiff to pay costs he is prejudiced thereby.

We have carefully examined the law to ascertain whether or not the words of general description which state that the tract of land is a part and parcel of lot 155, are sufficient to overcome the specific description of the land by courses and distances, and to sustain the judgment. On this question we find that words of particular



Tibbets Bros., Morey & Anderson, for plaintiff in error.

The identity of the person at the other end of the telephone wire must be shown before the conversation can be put in evidence. And this means that the other person must be identified as one having authority to speak. *Obermann Brewing Co. v. Adams*, 35 Ill. App., 540; *Murphy v. Jack*, 142 N. Y., 215, 36 N. E. Rep., 882; *Lord Electric Co. v. Morrill*, 59 N. E. Rep. [Mass.], 807; Rice, Criminal Evidence, section 302a; *People v. Ward*, 3 N. Y. Crim. Rep., 483; *Stepp v. State*, 31 Tex. Crim. Rep., 349; *Missouri P. R. Co. v. Heidenheimer*, 82 Tex., 195, 27 Am. St. Rep., 861; 24 Weekly Law Bul., 245; *Miles v. Andrews*, 153 Ill., 262, 38 N. E. Rep., 644; *Sullivan v. Kuykendall*, 82 Ky., 483, 56 Am. Rep., 901; *Oskamp v. Gadsden*, 35 Neb., 7; *Davis v. Walter*, 70 Ia., 465, 30 N. W. Rep., 804; 18 Washington Law Reporter, 629; 13 Legal News, 305; 24 Irish Law Times, 622; 4 Yale Law Journal, 223; 2 West Va. Bar, 164; *Deering & Co. v. Shumpik*, 69 N. W. Rep. [Minn.], 1088; *Crozer v. Eyre*, 2 Del. Co. Rep. [Pa.], 61.

Claude S. Wilson, contra.

It is not necessary for a witness to identify the voice of a speaker at the other end of a telephone line, before he can relate a conversation that took place between the witness and such other person over such line. *Wolfe v. Missouri P. R. Co.*, 97 Mo., 473, 11 S. W. Rep., 49, 10 Am. St. Rep., 331; *Globe Printing Co. v. Stahl*, 23 Mo. App., 451; *Shawyer v. Chamberlain*, 84 N. W. Rep. [Ia.], 661; *Reed v. Burlington, C. R. & N. R. Co.*, 72 Ia., 166, 33 N. W. Rep., 451, 2 Am. St. Rep., 243; *Rock Island & P. R. Co. v. Potter*, 36 Ill. App., 590; *Southwark Nat. Bank v. Smith*, 21 Penn. Co. Ct. Rep., 1; *Oskamp v. Gadsden*, 35 Neb., 7, 17 L. R. A., 440, note; *Sharon v. Sharon*, 79 Cal., 633, 22 Pac. Rep., 26; *Guest v. Hannibal & St. J. R. Co.*, 77 Mo. App., 258.

identify the communication as coming from any of plaintiff's employees. An examination of the record discloses that the fact of the conversation over the telephone concerning the delivery of the flour from plaintiff to defendant was first testified to by plaintiff's general manager in his evidence in chief; that he said that in the month of March a communication was received over the telephone from defendant's bakery inquiring about the delivery of his order for flour; that his attention was called to this communication by one of the employees who had received the communication, and that at that time the mill had been unable to make its deliveries promptly on account of pressure of business. He also testified that this was the only communication that the mill had received from defendant over the telephone to his knowledge. When defendant was placed on the stand he testified that he had never had but one communication with the mill over the telephone, but that this communication was had on January 18, and in the communication he inquired why they had not filled his order for flour given in January. There is no dispute between plaintiff and defendant about the fact that there was a communication over the telephone, nor about the substance of the communication; the only dispute being as to the time the communication was had, i. e., whether in January or in March. We think it is apparent from this statement that even if it were necessary, which we do not hold, to have identified the voice before admitting the evidence of the communication over the telephone, the foundation for the admission of this communication had been properly laid when plaintiff's agent testified to it in the first instance.

The only other allegation of error is with reference to the action of the trial court in refusing to strike out a memorandum from which defendant refreshed his memory in fixing the date of the communication with plaintiff over the telephone. The facts surrounding the ruling complained of are: That when defendant testified in chief, he said that at the time he communicated with plaintiff

Thomas D. Crane and J. J. Boucher, for plaintiff in error.

Montgomery & Hall, contra.

AMES, C.

In this action the plaintiff below, which is also the plaintiff in error, sued the defendant, who was formerly in the service of the plaintiff as salesman, to recover a sum alleged to be due from the defendant on account of his agency. The answer, besides a general denial, pleaded a counter-claim for an alleged unpaid balance of salary, and for expenditures incurred in the conduct of the agency. The defendant recovered a verdict and judgment for \$43.45, which this proceeding is prosecuted to reverse.

It is conceded by counsel that this result could have been reached only by allowing to the defendant two items of his alleged counter-claim which are in issue, and in support of which, the plaintiff contends, there is no evidence. The first of these two items is one of \$92.35, alleged to have been incurred as an outlay by the defendant as salary and expenses to one Bridges, as subagent, for services rendered between the 1st and 20th days, both included, of April, 1900. With respect to this charge, it appears that on May 26, 1900, the defendant rendered to plaintiff a memorandum of his account with Bridges containing an explicit statement that it was correct and a direction to plaintiff to ignore all other memoranda, and in which a charge was made for expenses and services, on the account in question, beginning with May 20, 1900. Except as below stated this seems to have been the first and only knowledge or notice the plaintiff had of the employment of Bridges until June 30, after the discharge of the defendant from its service, when he rendered it a further account claiming reimbursement for expenses and salary because of the employment of Bridges from April 1 to April 20. The first authority the plaintiff gave

claim for reimbursement for expenditures on account of Ragsdale. We conclude therefore that there is no support in the evidence for either of these disputed items of counter-claim and recommend that the judgment of the district court be reversed and a new trial granted.

HASTINGS and OLDHAM, CC., concur.

REVERSED AND REMANDED.

PAULINE B. MOORE, APPELLEE, v. ADDIE H. HORNSBY, APPELLANT, ET AL.

FILED JUNE 18, 1903. No. 12,934.

Commissioner's opinion. Department No. 3.

1. **Mortgages: FORECLOSURE: CERTIFICATES OF LIENS: WAIVER.** Certificates of liens against lands sold upon execution, as provided for by the Code of Civil Procedure, are for the benefit of the plaintiff and purchaser, and may be waived. If they are waived, it is not error for the sheriff to proceed with the sale without them.
2. **Mortgages: FORECLOSURE: APPRAISAL: EVIDENCE SUFFICIENT.** Evidence on the objection that the property was appraised too low examined, and held to sustain the order of confirmation.

APPEAL from the district court for Douglas county.
Tried below before, ESTELLE, J. *Affirmed.*

Hiram A. Sturges, for appellant.

J. L. Kaley, contra.

KIRKPATRICK, C.

This is an appeal from order of confirmation of a sale of real estate under a decree of foreclosure made by the district court for Douglas county. Two questions are presented in the brief of appellant touching the correctness of the judgment of the trial court. First, it is con-

3. **TRUSTS: PAYMENT BY BENEFICIARY: SUBROGATION: LIENS.** Upon failure of a trust to pay or secure certain debts, a beneficiary, who has been compelled to pay one of the debts intended to be provided for in order to protect her interests in the property, is entitled to be subrogated to the rights of the creditor so paid, and to have a lien upon the property in the same order as that held by such creditor.

APPEAL from the district court for Pawnee county. Tried below before LERTON, J. *Affirmed.*

F. A. Barton and F. Martin, for appellant.

Story & Story and Lindsay & Raper, contra.

POUND, O.

This suit involves the same transactions and grows out of the same controversy as *Walsh v. Walsh*, 1 Neb. [Unof.], 719, so that a further statement of the facts will not become necessary. After this court had affirmed the decree in the other case, Catherine Walsh sued to assert the claim of subrogation which she sought to set up by cross-petition in the prior suit. The court rendered a decree in her favor, from which the defendant Michael Walsh appeals.

The principal defense interposed is a plea of *res judicata*. But we find upon inspection of the record in the other case, which was put in evidence in this suit, that, although the decree sets forth that Catherine Walsh is not entitled to maintain her claim of subrogation, the basis of such finding was an order striking her cross-petition from the files purely for reasons of practice, and without any adjudication upon the merits of her claim. A judgment which disposes of a controversy otherwise than upon the merits is not available on a plea of *res judicata*. 2 Black, Judgments [2d ed.], section 693. Upon the merits we think the decree is clearly right. On failure of a trust to pay or secure certain debts, a beneficiary, who has been compelled to pay one of the debts intended to be provided

Albert W. Orites, for appellant.

*F. O'Linn, Allen G. Fisher and M. F. Harrington,
contra.*

GLANVILLE, C.

The record before us shows that the plaintiff made a loan to the defendant August 15, 1889, upon which the defendant realized the sum of \$684, and secured the same by the mortgage upon which the decree in this case was rendered; that the payments made by the defendant to the plaintiff from May 15, 1889, to March 15, 1897, inclusive, aggregate the sum of \$1,494, the average time of payment being three and three-fourths years after the date of the loan; that defendant has so paid to the plaintiff the amount realized by him on the loan together with interest thereon from its date, to the average time of his payments, at the rate of thirty-one and a half per cent. per annum.

It also shows that by a system of premiums, dues and fines, and by-laws and amendments to by-laws, and consolidation of series, and apportionment and distribution of premiums and profits, non-borrowing members of the plaintiff association in a series with which that of the defendant was consolidated, and its premiums and profits apportioned, have been repaid all the money by them invested, with interest thereon at the rate of thirty per cent. per annum for the average time of their investments; that non-borrowing members in the same series with the defendant have been repaid the sums invested by them, together with interest at fifteen per cent. per annum for the average time of their investments; that the former series was by this process matured in ninety-two months, while defendant's series ran for 117 months, and also that these results were brought about by changes made after the date of defendant's mortgage, to which he never consented.

The court below gave the plaintiff a decree for \$185.13,

Allen & Reed, for appellant.

M. D. Tyler, contra.

AMES, C.

The facts in this case are not in dispute. Appellant, who was plaintiff in the district court, was mortgagee, and the appellees were mortgagors in possession of a tract of farm land. A decree of foreclosure of the mortgage was rendered in April, 1900, and stayed at the request of the defendants. The land was sold under the decree on May 13, 1901, and the sale was confirmed and sheriff's deed executed and delivered pursuant thereto on the 23d of the same month. The mortgagors continued in possession and had, of course, notice of all these proceedings, and on, or immediately before, the last named date, completed the planting of a crop on the premises. They were and are insolvent but continued in possession and cultivated the crops without objection by the plaintiffs until the beginning of this action on the 14th day of August, 1901. The action was brought and prosecuted upon the theory that after the date of the sale and deed the defendants had remained in possession as tenants at will of the plaintiff and were liable to him for the reasonable value of the use and occupation. It was alleged that they were insolvent and were about to sell and dispose of the then ripened and ripening grains, in which the plaintiff claimed an interest to the extent of a third of their value, by way of rent, and prayed for an accounting and an injunction to restrain the defendants from disposing of the property until the amount of the plaintiff's claim should be ascertained and satisfied. A temporary injunction was granted and together with the summons duly served on the defendants on the same day. Nevertheless the defendant Andrew N. Nelson did sell a part of the grain, but whether before or after being notified of the injunction is disputed. He was cited to show cause why he should not

JOSEPH J. GALLENTINE, APPELLEE, V. ARCHIBALD CUM-
MINGS, APPELLANT, ET AL.

FILED JULY 3, 1903. No. 12,850.

Commissioner's opinion. Department No. 2.

1. **Mortgages: FORECLOSURE: NOTICE OF SALE, CONTENTS OF.** It is not essential that a notice of sale, under a decree of foreclosure, should state the amount due on the decree.
2. **Mortgages: FORECLOSURE. ORDER OF SALE: DECREE ATTACHED.** It is not a valid objection to a confirmation of such sale that a copy of the decree was not attached to, or incorporated in, the order of sale.
3. **Mortgages: FORECLOSURE: DECREE: RECORD: SIGNATURE OF JUDGE.** The signature of the presiding judge, to a decree or the record, is not essential to the validity of the decree.

APPEAL from the district court for Buffalo county.
Tried below before SULLIVAN, J. *Affirmed.*

B. O. Hostetler, for appellant.

Frank E. Beeman, contra.

ALBERT, C.

This is an appeal from an order confirming a sale made in pursuance of a decree of foreclosure. Of the many objections lodged against the confirmation of the sale, but three are relied upon in this court and we shall consider them in the order in which they are presented in the appellant's brief.

1. The first objection is that the notice of sale does not contain a statement of the amount due on the decree. The objection was properly overruled. It is not essential to the validity of a notice of a sale under the decree of foreclosure that it state the amount of the decree. *Stratton v. Reisdorph*, 35 Neb., 314. The appellant cites *Cook v. Foster*, 55 N. W. Rep. [Mich.], 1019, as indicating a contrary doctrine. That case is not in point because there

FRANK H. PARKER V. LEWIS C. PARKER ET AL.

FILED JULY 3, 1903. No. 12,861.

Commissioner's opinion. Department No. 1.

Fraudulent Conveyances: ONE MUST SEEK EQUITY WITH CLEAN HANDS.
Evidence examined, and held sufficient to sustain the judgment of the trial court.

ERROR from the district court for Gage county. Tried below before STULL, J. *Affirmed.*

G. M. Johnston, for plaintiff in error.

Samuel Rinaker, R. S. Bibb, A. H. Babcock, T. J. Doyle and E. O. Kretsinger, contra.

OLDHAM, C.

This case is an aftermath grown from the stubble of *Sheldon v. Parker*, 66 Neb., 610, 634, 92 N. W. Rep., 923, 95 N. W. Rep., 1015. In the former case the contest was between the trustee in bankruptcy of the estate of Lewis C. Parker, Maude Lord Parker, his wife, and others, for the purpose of subjecting the lands now in dispute, and other property, to the payment of the debts of the bankrupt. A full history of the dealings and transactions between Frank H. Parker, plaintiff in the present case, and Lewis C. Parker and wife, with reference to the lands in dispute, is contained in the opinions of this court in *Sheldon v. Parker, supra*.

After *Sheldon v. Parker, supra*, had been instituted in the district court for Gage county, the present cause of action was instituted by Frank H. Parker against Lewis C. Parker and Maude Lord Parker, the trustee in bankruptcy of the estate of Lewis C. Parker, and others, for the purpose of cancelling a deed, executed by the plaintiff in this cause of action to Lewis C. Parker to a one-half interest in about sixteen acres of land, referred to in the rec-

to Lewis C. Parker and that the first name of his brother was written in pencil, and that this name was subsequently erased from the deed and the name of Maude Lord Parker inserted. We do not doubt that the latter statement is true and that the former affidavit and deposition were false, but it clearly appears from the correspondence between these brothers that the present plaintiff knew the object of having the first name of his brother written in pencil and knew that his brother was going to erase it and insert the name of some one else in its stead for the purpose of defrauding creditors. One who appears with his hands grimed to the wrists by such dubious transactions deserves no consideration from a court with a conscience.

It is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and AMES, CC., concur.

AFFIRMED.

CHADRON LOAN & BUILDING ASSOCIATION, APPELLANT, V.
ROBERT C. SCOTT ET AL., APPELLEES.

FILED JULY 3, 1903. No. 12,863.

Commissioner's opinion. Department No. 1.

1. **New Trial: NEWLY-DISCOVERED EVIDENCE: TIME OF FILING MOTION.**

A motion for a new trial on the ground of newly-discovered evidence must be filed at the term, but not necessarily within three days from the date, of the rendition of the judgment complained of.

2. **New Trial: TIME OF SUBMISSION OF MOTION: AFFIDAVITS.**

A motion for a new trial duly filed within the time prescribed by statute at one term of court may be heard and decided at a subsequent term, and if affidavits are required for its support they may be filed at any time before its final submission.

APPEAL from the district court for Dawes county. Tried below before HARRINGTON, J. *Affirmed.*

practice of deciding such motions at a term subsequent to that at which they were filed has become general. In the same case it was held that affidavits in support of a motion for a new trial may be filed at any time before its submission. In the light of the foregoing authority there seems to be no room for doubt that the court had as ample jurisdiction to hear and decide the motion at the subsequent term, as at that at which it was filed.

In *Weber v. Kirkendall*, 44 Neb., 766, this court held, quoting from the syllabus:

"2. Primarily the office of a motion for a new trial is to afford the court an opportunity to correct errors in its own proceedings without subjecting parties to the expense and inconvenience of appeal or petition in error.

"3. The power to correct errors in their own proceedings is inherent in all courts of general jurisdiction, and in the exercise of that discretion they are governed not alone by this solicitude for the rights of litigants but also by consideration of justice to themselves as instruments provided for the impartial administration of the law.

"4. A stronger case will be required for interference by this court on account of an order setting aside a verdict resulting in a second trial on the merits of a cause than where the motion therefor is denied. *Bigler v. Baker*, 40 Neb., 325."

Within the rule thus announced we are of opinion that the affidavits in support of the motion for a new trial are sufficient to justify the order granting it, although it is probable that they would not have upheld an assignment of error in denying it. The principal objection made to them is that the newly-discovered evidence disclosed by them is largely cumulative. But it has been repeatedly held by this court that evidence of that character is sufficient, if it is of such a nature as that it can be seen that it would probably have changed the result of the trial. That in the opinion of the trial judge it would have done so in this case, is demonstrated by the facts that both trials were before him without a jury; that he granted the mo-

weeks' work from February 5, 1898, to December 9, 1898, at \$2.50 per week, \$110; that the said defendant agreed to pay her, the said plaintiff, the reasonable value of said services; that defendant accepted said services and received the benefit thereof; that said services were reasonably worth the sum of \$180; that there had been paid on the said work and labor the sum of \$15, leaving a balance due the plaintiff from the defendant of \$165, no part of which had been paid, and prayed for a judgment against the defendant for the said sum of \$165, and costs of suit. To this bill of particulars the defendant answered as follows:

"(1) Denied each and every allegation contained therein; (2) alleged that about the time alleged in the plaintiff's petition plaintiff became a member of the family of the defendant, with the understanding and agreement that the defendant was to support, clothe and care for the plaintiff and her minor child, and that plaintiff was to live with defendant and be a member of her family for such period as plaintiff might desire; that at the time plaintiff became a member of defendant's family she was without a home and had to depend upon going out to labor for herself and child; that there never was any agreement for the payment of wages to the plaintiff, but on the other hand there was a distinct understanding between the parties that plaintiff and her minor child were to be members of the family of defendant, and that defendant was to support and clothe them during such period as they might choose to remain with her, and was not to include wages."

On these issues the cause was tried before the justice without a jury; the court found that the plaintiff had worked for the defendant for the period of sixty weeks; that there was an implied contract that the defendant was to pay the plaintiff a reasonable compensation for her services, which the court itemized and found to be as follows: Fifty-two weeks at \$2 per week, \$104; eight weeks at \$5 per week, \$40, making a total of \$144; that

The plaintiff also contends that the evidence does not sustain the judgment. An examination of the record discloses that there was a conflict of evidence on the question as to whether or not defendant herein was to receive pay for her services. She testified that plaintiff requested her by letter to come and live with her, and assist in the work about the house and premises, promising to pay a reasonable compensation therefor. This was denied by the plaintiff. The defendant also testified that at another time when nursing the plaintiff, who was ill, the plaintiff said to her: "That if anything should happen and she should not get well, I would receive my wages just the same." This was denied by the plaintiff, but she admitted that they had some talk about the matter. The plaintiff testified that she never made any arrangements or agreement with the defendant to pay her wages, but admitted that her services were worth more than the board of herself and minor child, and the articles of clothing which she had purchased for her.

It appearing that there was such a conflict of evidence as we have described, it was proper for the district court to sustain the finding and judgment of the justice of the peace. The district court rightly concluded that the justice having heard the evidence of the witnesses, having had an opportunity to observe their demeanor upon the trial, their apparent truthfulness or lack thereof, and all of the incidents which go to make up the trial, was better able to determine to which party he should give the most credit. And the same rule should prevail in the district court that we have so often announced as the rule of this court, that where there is some competent evidence to sustain the finding of the justice, and it can not be said that his judgment was clearly wrong, it should be affirmed.

We therefore hold that the judgment of the district court was right, and we recommend that it be affirmed.

GLANVILLE and ALBERT, CC., concur.

AFFIRMED.

lease. *Sisson v. Kaper*, 75 N. W. Rep. [Ia.], 490; *Bryant v. Thesing*, 46 Neb., 244; *Barnett v. Pratt*, 37 Neb., 349; Abbott, Trial Evidence [2d ed.], 648; *Mann v. Nunn*, 43 L. J. C. P., 241, 30 Law Times Rep., 526; *Hines v. Wilcox*, 96 Tenn., 148, 54 Am. St. Rep., 823; *Durkin v. Cobleigh*, 17 L. R. A. [Mass.], 270; *Welz v. Rhodius*, 44 Am. Rep. [Ind.], 747; Boone, Real Property [2d ed.], section 103e; *Barr v. Kimball*, 43 Neb., 766; *Wolfe v. Arrott*, 109 Pa. St., 473; *Holley v. Young*, 66 Me., 520; *Jackson v. Odell*, 12 Daly [N. Y.], 345; *Pryor v. Foster*, 1 N. Y. Supp., 774, 130 N. Y., 171; *Myers v. Rosenback*, 25 N. Y. Supp., 521; *Rover Iron Co. v. Trout*, 2 S. E. Rep. [Va.], 713.

W. A. Saunders, contra.

Parol evidence of prior or contemporaneous agreements not included in the written lease are inadmissible, and no parol evidence can be received to contradict, alter or extend the terms of the lease. *Mattison v. Chicago, R. I. & P. R. Co.*, 42 Neb., 545; *Maxwell v. Burr*, 44 Neb., 31; *Sylvester v. Carpenter Paper Co.*, 55 Neb., 621; *Western Mfg. Co. v. Rogers*, 54 Neb., 456; *Nebraska Exposition Ass'n v. Townley*, 46 Neb., 893; *Commercial State Bank v. Antelope County*, 48 Neb., 496; *Dodge v. Kiene*, 28 Neb., 216; *Clarke v. Kelsey*, 41 Neb., 766; *Hamilton v. Thrall*, 7 Neb., 210; *Kaserman v. Fries*, 33 Neb., 427; *Watson v. Roode*, 30 Neb., 264; *Stanisics v. McMurtry*, 64 Neb., 761; *Minneapolis & St. L. R. Co. v. Cox*, 41 N. W. Rep. [Ia.], 24; *Kelly v. Chicago, M. & St. P. R. Co.*, 61 N. W. Rep. [Ia.], 957; *Reeves v. McComeskey*, 168 Pa. St., 571, 32 Atl. Rep., 96; *Cleves v. Willoughby*, 7 Hill [N. Y.], 83; Taylor, Landlord and Tenant, section 646; *Stantz v. Protzman & Peer*, 84 Ill. App., 434; *Long v. Gieriet*, 59 N. W. Rep. [Minn.], 194; *Doolittle v. Selkirk*, 28 N. Y. Supp., 43; 12 Am. & Eng. Ency. Law [1st ed.], 748; *Tibbits v. Percy*, 24 Barb. [N. Y.], 39; *Wilson v. New United States Cattle-Ranch Co.*, 73 Fed. Rep., 994; *Reynolds v. Palmer*, 21 Fed. Rep., 433; *Empire State Phosphate Co. v. Heller*, 61 Fed.

Bauer v. Taylor.

said representations of the plaintiff in negotiating for the lease upon said premises. Defendants further aver that at the time they signed said lease, the said plaintiff orally again assured the defendants that the said representations as to the premises being in good condition were true in all respects; and at the time, and in consideration of the signing of said lease, then and there, verbally promised and agreed with the defendants that if there were any defects in said premises, or in its equipment or appurtenances, he the said plaintiff would remove such defects immediately and place said premises in good condition and suitable and fit for the purpose for which the defendants desired to use them. Defendants allege that the said representations so made to the defendants were false and that the plaintiff failed, neglected and refused to carry out and perform his said agreement to place said premises in repair and remove the defects existing therein at the time of the signing of said lease. Defendants aver that the only means of heating the said premises was by a furnace located in the basement of the building, and the pipes in said furnace were so defectively arranged that no heat could be conveyed from said furnace to the working room, or room where the butter and other provisions were prepared for the market, and without heat in said room, it was impossible for the defendants to use the room. Said furnace was also defective in that it was worn out and in a dilapidated condition; it had neither grate nor linings, and it would not heat either the business portion of the premises to make it fit to carry on business, nor the residence portion of the premises to make that part fit and safe for the family to live in; and when fire was lighted in said furnace coal gas constantly escaped therefrom, filling the entire premises, and especially the residence portion thereof, to such an extent as to render the place dangerous to life. That the range in the kitchen was broken down and would not work, the back porch of the residence was in a dilapidated condition, and was unsafe for a person to go upon. Defendants aver

poses; that the building was heated by means of a hot-air furnace situated in the cellar, which furnace was in good condition and suitable for the purpose intended; that the furnace would furnish the necessary heat for carrying on the business of making and preparing butter for the market; that it furnished sufficient heat to make the two upper stories habitable and comfortable as a residence; that all of these representations were relied upon by plaintiffs in error and were false; that the furnace was worn out and worthless; that it would furnish no heat for the work-room or the living rooms; that when an attempt was made to use the furnace it allowed coal gas to escape into the living rooms to such an extent that Bauer and other members of his family were made sick and confined to their beds; that the living rooms could not be heated, and were wholly uninhabitable; that defendant in error had further represented and agreed that if there were discovered any defects in the premises which interfered with the comfortable use and enjoyment, upon notice he would immediately make repairs and remedy the defects found to exist; that plaintiffs in error immediately notified him of the condition of the premises and that they were unsuitable; that on the occasion of each payment of rent defendant in error was notified of the condition of the premises, and that the members of the Bauer family were made sick by the condition of the building, and that plaintiffs in error would be obliged to vacate the building unless the defects complained of were remedied; and that defendant in error repeatedly promised and agreed to make the repairs but failed to do so, in consequence of which failure plaintiffs in error vacated the premises.

The evidence further discloses that plaintiff in error Bauer went upon the premises, but at the time he went into the cellar it was so dark that he could not make a thorough examination. It is also disclosed that defendant in error did make some repairs, expending the sum of \$10 in repairing the furnace; but it appears that the furnace was old and worn out, and could not be put in repair.

Pryor v. Foster holds that a tenant induced to lease premises by reason of the false representations of the landlord as to the heating capacity of a furnace does not by payment of the rent waive the right to sue for damages.

In *Wolfe v. Arrott* an affidavit of defense to a claim for rent setting forth that the landlord falsely represented the sanitary condition of the dwelling house to be good was held to be a good defense.

In *Meyers v. Rosenback*, 25 N. Y. Supp., 521, the defendant in an action on the lease pleaded that he was induced to sign the lease by the false and fraudulent representations of the plaintiff that the building was fit for the purpose for which defendant wished to use it, and that the plaintiff knew at the time that they were false, and it was there held that evidence of the conversations and representations made which were the inducing cause were admissible.

We think the cases cited sufficiently distinguish a case of fraudulent representations inducing the signing of a lease from a case in which the lessee seeks to fasten upon the landlord the cost of necessary repairs where he had failed to secure the insertion in the lease of a provision requiring the landlord to make the repairs. In the latter case, we do not doubt that if because of the active fraud of the landlord, the written lease failed to show the actual agreement that the landlord should make the repairs, the lessee, having properly pleaded such fraud, would be permitted to recoup his damages, or, if forced to remove because of the failure to repair, would be entitled to defend an action for rent upon that ground. However, in the absence of any pleading of fraud, it is very manifest that the rule which excludes evidence to contradict the writing is applicable, and the lease must then be permitted to speak alone. *Cleves v. Willoughby*, 7 Hill [N. Y.], 83; *Reeves v. McComeskey*, 32 Atl. Rep. [Pa.], 96.

In view of what has been said, does the answer quoted state a defense? We have already concluded that fraud in procuring the lease is a sufficient defense, but the suffi-

duct of the lessor, at the time of the signing of the lease, be inadmissible. There is no such knowledge on the part of the lessor of the falsity of the representations, no fraudulent intent charged in the answer.

Barr v. Kimball, supra, relied on by plaintiffs in error, is distinguishable from the case at bar. The answer in that case distinctly charged that the false representations upon which the defendant relied to their injury were known to be false by the plaintiff, and the decision is placed upon the ground that the evidence was sufficient to support the finding that the representations were false "and known to be so when made by the party making them."

We conclude therefore that the answer was insufficient to admit the evidence tendered, and such evidence was properly excluded. In its absence, there is no question made as to the propriety of directing a verdict for plaintiff in the court below.

It is therefore recommended that the judgment of the trial court be affirmed.

DUFFIE and POUND, CC., concur.

AFFIRMED.

Opinion on rehearing follows.

HENRY L. BAUER ET AL. V. RICHARD TAYLOR.

FILED JANUARY 21, 1904. No. 12,951.

Commissioner's opinion. Department No. 2.

1. **Fraud: MISREPRESENTATIONS: DAMAGES: INTENT.** Where one has made representations of fact shown to be false upon which the other party has relied to his damage, the intent or good faith of the party making the representations is immaterial in an action by the injured party to recoup his damages, or in an action by the former where the latter pleads the fraud of the plaintiff as a defense.
2. **Trial: EVIDENCE: ADMISSIBILITY: APPEAL AND ERROR.** Rulings of the trial court on the exclusion of evidence, held erroneous.

KIRKPATRICK, C.

An opinion was rendered in this case at a former sitting of the court, and the case is here upon rehearing. The statement of facts contained in the prior opinion being sufficient for the purpose of disposing of the question now presented, a restatement will not be necessary herein. In the trial of this cause in the lower court practically all of the testimony of plaintiffs in error in support of the allegations pleaded in the answer that they were induced to enter into the lease by the fraudulent representations of defendant in error, and the evidence offered for the purpose of showing that the premises leased were not in a habitable condition, was by the trial court excluded, and it was held that these rulings on the evidence were not erroneous because of the insufficiency of the answer in failing to allege that the false representations which induced the execution of the lease were made by the lessor with knowledge of their falsity. In holding that the *scienter* was essential to a complete defense in an action like that at bar, where the lessor seeks to collect rents due under the lease, and the lessee alleges the lessor's fraud inducing the execution of the lease, the rule as it obtains in some of the states of the union was followed. It appears, however, as shown by the cases cited in brief of counsel for plaintiffs in error at this hearing, that a contrary rule has been adopted and adhered to in this state, namely, that where one has made statements shown to be false, upon which the other party has relied to his damage, the intent or good faith of the party making the statements is immaterial in an action by the injured party to recoup the damages by him suffered, or, as in this case, where the party suffering the injury is defendant and pleads the fraud of the plaintiff as a defense. *Johnson v. Gulick*, 46 Neb., 817; *Gerner v. Mosher*, 58 Neb., 135.

This rule is firmly established in this state, and we have no disposition to announce a different holding at this time. The judgment of affirmance heretofore entered was

ERROR from the district court for Frontier county.
Tried below before NORRIS, J. *Affirmed.*

J. L. White, for plaintiff in error.

W. R. Starr, contra.

DUFFIE, C.

This action was commenced in justice court, where judgment went in favor of the plaintiff. An appeal was taken to the district court, but the transcript was not filed for more than thirty days after the rendition of the judgment in the justice court. Motion was made to dismiss the appeal upon this ground. A number of affidavits were filed both in support of the motion and in resistance thereof. Oral testimony also appears to have been offered by the parties. The court overruled the motion, gave the plaintiff thirty days in which to file his petition and the defendant thirty days thereafter to plead, and to this ruling the plaintiff took an exception. The plaintiff failed to file his petition or to plead or appear further in the case, standing on his motion to dismiss; and the action being one in replevin and the property having been delivered to the plaintiff, a trial was had to a jury and a verdict returned finding that the defendant was entitled to the possession of the property when the action was commenced. Judgment was entered upon this verdict and the plaintiff has taken error to this court.

The only error assigned is that the court erred in refusing to dismiss the appeal. It has been held in numerous cases that a failure to file transcript within thirty days from the rendition of the judgment appealed from will not cause a dismissal of the appeal, provided the failure to file the transcript was not caused by the neglect of the appellant. This is so well understood that a citation of the cases is not necessary. The defendant in error evidently made a showing that the failure to file the tran-

alleges that the judgment complained of was rendered October 6th, at the October, 1900, term of court, and that no knowledge of it reached the defendant till May following, on the ground that it does not show that the October term had adjourned at that time, will not be entertained when raised for the first time on appeal in this court.

4. Judgment: VACATION AFTER TERM: ATTORNEY AND CLIENT: MISUNDERSTANDING OF ATTORNEY AS TO EMPLOYMENT. A misunderstanding between home attorneys of a defendant, sued in a county more than two hundred miles from his residence, where service was obtained through his temporary presence there, and attorneys at the place of suit, by reason of which the latter supposed that their employment was only temporary and preliminary, but the former and the defendant regarded it as general and for the entire case, for which reason a valid defense of presentation and a judgment was rendered on an *ex parte* hearing, is sufficient ground for setting the judgment aside on petition after the term, where the defendant has acted with reasonable diligence in preparing his defense and with promptness on learning of the judgment.
5. Judgment: VACATION AFTER TERM: MISUNDERSTANDING OF ATTORNEY: PLEADING: EVIDENCE SUFFICIENT. Such a misunderstanding, *held* to be sufficiently set forth in the pleading, and the court's finding that it existed sustained by the evidence.

APPEAL from the district court for Douglas county.
Tried below before DICKINSON, J. *Affirmed.*

E. G. McGilton and James H. McIntosh, for appellant.

Gaines, Kelby & Storey, contra.

HASTINGS, C.

This is an appeal from a decree vacating a judgment and granting a new trial in an action by J. P. Looney against J. H. MacCall, in which action judgment was recovered by Looney on October 6, 1900. July 12, 1901, MacCall filed his petition to vacate the judgment on the ground of a misunderstanding between his attorneys at his home in Lexington and Greene & Breckenridge of Omaha, because of which he relied upon Greene & Breckenridge to present his defense, and they on the other hand had merely supposed that they were employed to render some preliminary services which had been specifically requested by Warring-

what the books would set forth; that the facts set forth in the affidavit were sufficient to entitle him to his original decree, which found MacCall, as a delinquent stockholder, liable for Looney's judgment against the Meridian Canal Company; he also alleged that his original action against MacCall was instituted on May 5, 1897, and that after such date and before the rendition of the decree in October, 1900, MacCall had transferred all his property, to the value of more than \$50,000, for the purpose of defrauding his creditors and purposely thereafter neglected the defense of Looney's action. A motion to strike this last allegation from the answer was overruled and in June an amendment was filed to MacCall's petition setting out some correspondence between Warrington & Stewart and Greene & Breckenridge and expanding the allegations as to the mutual misunderstanding between Warrington & Stewart on behalf of MacCall and Greene & Breckenridge with reference to the latter's employment. A general denial was filed to this amendment, and on July 1, 1902, trial was had before the same judge who entered the original decree against MacCall. He made a general finding on MacCall's petition in the latter's favor and decreed that the judgment of October 6, 1900, should be vacated and annulled and the original case of Looney against MacCall reinstated and assigned for trial and awarded to MacCall his costs in the present proceedings.

From this judgment Looney appeals and urges, first, that MacCall had no remedy in equity because his proper proceeding was under section 602 of the Code; second, that MacCall's petition does not show diligence in presenting his application to set aside the default judgment; third, that the allegations as to a misunderstanding among the attorneys are not sufficient to excuse his non-appearance, and fourth, that the evidence of such misunderstanding is not sufficient to show an equitable right to a new trial. Counsel for MacCall have apparently abandoned the claim of willful perjury and the claim of an agreement not to take up the case pending the presidential election.

It is next claimed that in any event the allegations of the MacCall petition are insufficient to show that the rendition of the original decree was obtained without fault, laches or negligence on his part. The objections to the petition are, first, that so far as the allegations of an agreement that cases should not be tried until after the presidential election, that there is no allegation when the term of court adjourned; nor that it did not last some months after the presidential election; that in fact it did so last and no diligence was used by MacCall, or his attorneys, to protect his rights during all of that time. MacCall is not now insisting on that ground of defense. He is insisting on the defense that he and his home attorneys were relying on the employment of Greene & Breckenridge, and that the latter did not understand that they were so employed and permitted a default judgment on an *ex parte* hearing.

It is claimed that the petition does not set forth when the October term was ended and that so far as the allegations go there was nothing to show that the court trying the case did not still have jurisdiction to set aside the decree. It hardly seems probable that this objection is seriously made, and it was not urged at the argument. This court must take judicial notice that terms of court are required to be set annually and it will not presume that the October term of Douglas county district court lasted until July following.

Doubtless, a petition for relief in equity from a judgment should indicate that the court making the record had no longer jurisdiction to correct it. An allegation of the reasons for the non-appearance of the defendant during the term at which the action was originally tried is necessary. In this case the allegations relied upon are, that Greene & Breckenridge did not understand that they were so employed and that Warrington & Stewart and MacCall himself had no knowledge that the case had been brought to trial until they learned it by the institution of a creditors' bill proceeding to enforce the judgment in May following.

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W. Van Gilder, of the contract set forth in paragraph one of said petition, nevertheless this defendant received the assignment of said contract as set forth in said paragraph three for his own personal individual use equal and jointly with his brother James E. Van Gilder; and that this defendant and the said James E. Van Gilder are the owners respectively of an undivided one-half interest in and to the premises described in said petition, and that each of them are in the actual possession of the premises described in said petition, and in the actual use and occupation of the same.

"Wherefore this defendant prays that the petition herein be dismissed at plaintiffs' cost, and for such other and further relief as may be just and equitable upon the trial of this cause for the full and complete protection of this defendant."

The reply was a general denial; the cause was duly tried to the court and the following decree was rendered:

"Upon consideration of the pleadings and the evidence the court finds that the allegations contained in the petition are true.

"It is therefore ordered, adjudged and decreed by the court that the defendants, and all persons claiming by, under or through them or either of them, be, and they are hereby, forever barred and foreclosed of all and any equity of redemption, or any right or interest in and to the following described premises: (here follows description as set forth in the petition), and that the contract set forth in plaintiffs' petition between J. F. Grove and Mary J. Grove, husband and wife, and J. M. Dineen, and recorded in book 3 of Miscellaneous Record of Boone county, Nebraska, in the office of the county clerk of said county at page 469 thereof, is hereby canceled, annulled and made of no force or effect whatever; and that the plaintiffs pay the costs of this action taxed at \$19.23."

From this decree the defendant, Van Gilder, appeals to this court, and now contends that the decree is unjust and inequitable; that time was not made the essence of the

It is quite probable if the appellant had asked for such relief it would have been granted. The prayer of the petition which contained a demand for general equitable relief was broad enough to sustain the decree complained of, and we are bound to presume that the evidence disclosed a state of facts which fully authorized the findings and judgment. The rule is, that where the record does not purport to contain the evidence a state of facts will be presumed proved in the trial court fully authorizing the rulings, verdict and judgment of that court. 2 Ency. Pl. & Pr., 441. To sustain a decision appealed from, the general presumption exists, where the record does not affirmatively show error, that every proceeding essential to the legality and validity of the judgment was validly taken. And where, on any contingency supposable in the state of the record the decision below might have been valid, such contingency will be presumed. 2 Ency. Pl. & Pr., 428-433. "In the absence of a bill of exceptions, if the petition or pleading on which the decree is predicated contains sufficient statements of a cause, and a proper prayer for the relief thereby afforded, questions which for decision necessitate a reference to the bill of exceptions will not be considered, and an affirmance of the decree is proper." *Beatrice Savings Bank v. Beatrice Chautauqua Assembly*, 54 Neb., 592, 74 N. W. Rep., 1065.

In *Alling v. Fisher*, 55 Neb., 239, 75 N. W. Rep., 536, it was held that "In the review of cases by appellate proceedings in this court, the transcript being silent as to matters before the district court, it will be presumed that the facts there disclosed were of such a character as to warrant the judgment rendered."

An examination of the authorities convinces us that this is the well established rule not only in this state but in the supreme court of the United States, and in all of the states of the union.

While the forfeiture of the first payment, at first blush, may seem inequitable, yet Dineen who made it is not complaining. And in the court below the appellant presented

G. W. Bemis, for plaintiffs in error.

W. W. Wyckoff and *F. C. Power*, *contra*.

AMES, C.

This is an action to enjoin the authorities of the city of York from levying a special assessment upon certain real estate of the plaintiffs, to defray the expense of building a sidewalk adjacent thereto and along certain public streets. The action was tried in the district court upon issues joined by petition, answer and reply, but the evidence was not preserved in a bill of exceptions, and although a motion for a new trial was filed it does not appear to have been ruled upon by, or called to the attention of, the district court. None of the pleadings was impeached or sought so to be in the lower court by motion or by demurrer. The court found both specially and generally for the defendants and dismissed the action.

The plaintiffs seek a review in this court by petition in error. Under these circumstances it was possible for the plaintiffs to assign but one ground of error in this court, viz., that the answer does not state facts constituting a defense to the petition. This they have not done or, if their first assignment can be construed as equivalent thereto, they have waived it by making no allusion to it in their brief. We have, however, examined the answer and are of opinion that it does state a defense, but do not feel called upon to enter upon a discussion of it.

It is recommended that the judgment of the district court be affirmed.

HASTINGS and OLDHAM, CC., concur.

AFFIRMED.

Opinion on rehearing follows.

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But the findings in this case include a general finding for defendants. It is true that they include a finding that the rest of the walk along Conner's half of the lots was never built and that no steps were taken to have it built. That, however, was not in issue and can not help plaintiff. There is also a finding that no advertisement for bids was published before the construction of the walk.

As before stated, there is no bill of exceptions and we know nothing from the record as to what the city ordinances required in this respect. We are not at liberty to learn anything to the prejudice of this judgment from any other source. We are not at liberty to take judicial notice of ordinances which, so far as the record shows, were never presented to the trial court as evidence. We are no more able to conclude from the findings of the trial court than we are from the pleadings that plaintiffs are entitled to an injunction. Whether or not the trial court was right in holding that the failure to build the entire walk would be no ground for enjoining this assessment, it is not necessary to determine as that issue is not in the pleadings. Whether or not the trial court was right in holding that the failure to advertise for bids before constructing the walk gave no right to an injunction, could only be ascertained by reference to ordinances not before us. No such requirement is cited from the statutes of Nebraska. These findings do not necessarily call for a different decree than that rendered.

Plaintiffs say the burden of showing a compliance with all statutory and municipal requirements rests upon defendants. It hardly seems so. Plaintiffs are seeking an injunction against the action of a public body. To justify that plaintiffs must show that the proposed action is wrong. That is, in this case they must show that there is, at least on the face of the record, an absence of some jurisdictional fact, the want of which deprives the city authorities of the right to go further in the matter of assessing plaintiffs for this walk. We must assume, in the absence of a bill of exceptions, that the ordinances and municipal records support the proposed action.

Tried below before HOLMES, J. *Reversed in part with directions.*

S. B. Pound and Frank H. Woods, for appellant.

A. G. Greenlee, contra.

ALBERT, C.

The petition in this case shows that the plaintiff, on the 16th day of January, 1897, recovered a judgment against the defendant William Dullenty, in the county court of Lancaster county, for some \$960, on a note executed by said defendant on the 19th day of January, 1894, which by its terms was payable on the 19th day of April of that year; that at and before the date of said note said defendant was the owner of a certain tract of farm land in Lancaster county and that afterward, on the 31st day of August, 1894, he conveyed the land to his father-in-law who, in the following year, conveyed it to Mary Dullenty, wife of the defendant William and his codefendant in this case; that the said conveyances were without consideration and were made in fraud of the plaintiff and for the purpose of hindering it in the collection of its judgment. It is also alleged in the petition that the defendants claim that said farm lands, at the time of said conveyances, were owned and occupied by them as their homestead, but that the value thereof is in excess of \$2,000, and that the defendants had long since abandoned such premises as their homestead. The plaintiff alleges further that the defendant William, on the 19th day of November, 1900, purchased a certain lot in the city of Lincoln and paid the consideration thereof; that for the purpose of hindering, delaying and defrauding the plaintiff and his other creditors in the collection of their debts, he caused the title thereto to be taken in the name of his wife; that she now holds the title to said lot in trust for her said husband and codefendant and that the defendants have resided on and occupied, and still reside on and occupy, such lot and

out any consideration, turned the contract over to his wife, who is a sister of the defendant Mrs. Dullenty. Afterward, the debt of \$145 was paid but the contract and assignment do not appear to have been returned to William Dullenty. Afterward, Mrs. Moran turned the contract over to Mrs. Dullenty who, in turn, traded it for the lot in question. It does not appear that Mrs. Dullenty paid her sister anything whatever for the contract, nor that she made any promise to pay anything for it. There is an entire absence of evidence tending to show that she gave any consideration whatever for the contract. The trade for the lot was made in November, 1900, after the return of the execution issued on the plaintiff's judgment; the conveyance was not recorded for more than a year afterward. The whole transaction in regard to this lot was among relatives. Taking into account that fact, the nature of the transaction, the attending circumstances and the situation of the parties at the time, there is but one reasonable inference to be drawn and that is that, when the contract was given in exchange for the lot in question, it was the property of William Dullenty. In other words, the sole consideration for the lot was paid or given by him and the conveyance was taken in the name of his wife for the purpose of placing the property beyond the reach of his creditors. That being true, the defendant William Dullenty is the real owner of the lot and it is liable for the satisfaction of his debts.

But the defendants contend that the plaintiff, having alleged in its petition that the lot in question is the homestead of the defendants, is not entitled to any relief as to this lot, in the absence of an allegation that it is worth more than two thousand dollars. A sufficient answer to this is that the petition does not allege that the lot is the homestead of the defendants. The allegation in that behalf is as follows: "That ever since the purchase of said lot, said defendants have resided on and occupied and still reside upon and occupy such lot and claim the same as their homestead." The petition also alleges that they

district court to enter a decree, as to such lot, in favor of the plaintiff, in accordance with the prayer of its petition.

REVERSED IN PART WITH DIRECTIONS.

CLARENCE L. CHAFFEE ET AL. V. LEOPOLDINE SEHESTEDT
ET AL.

FILED JULY 3, 1903. No. 12,970.

Commissioner's opinion. Department No. 1.

1. **Mortgages: MECHANICS' LIENS: PRIORITIES: CONTRACTS.** The lien of an ordinary mortgage is not subordinate to mechanics' liens, because the money which it was given to secure was loaned for the purpose of improving the mortgaged premises and under an express contract that it should be so used. *Henry & Coatsworth Co. v. Halter*, 58 Neb., 685, followed and approved.
2. **Mortgages: FORECLOSURE: EVIDENCE OF "ACTION AT LAW": FOR WHOSE BENEFIT: PREJUDICE.** Proof of the allegation that no proceeding at law has been had, in a suit to foreclose a real estate mortgage, is required for the benefit of the mortgagor. The omission of proof of this allegation in a contest between lienors is at most error without prejudice.

ERROR from the district court for Douglas county.
Tried below before KEYSOR, J. *Affirmed.*

Martin Langdon and S. A. Searle, for plaintiffs in error.

Gains, Kelby & Storcy, contra.

OLDHAM, C.

This cause of action was instituted by the plaintiff Chaffee in the court below for the purpose of foreclosing a mechanic's lien on two lots situated in Douglas county, Nebraska. The owners of the premises, the mortgagee, and other lienors, were made parties defendant. The mortgagee, The Omaha Building & Loan Association, filed an answer and cross-petition, alleging that the lien of its mortgage was prior to that of plaintiff and the cross-

Chaffee v. Sehestedt.

petitioners, and praying for a decree of foreclosure. On issues thus joined between the mortgagee and the lienors, a trial was had and a judgment rendered decreeing a foreclosure of the mortgage and sale of the property, and finding that the lien of the mortgagee was superior to the various liens of the mechanics and material men. An accounting was also had of the amount due on each of the liens of the mechanics and material men, and these were all adjudged to prorate as a second lien upon the premises. To reverse this judgment and decree, error proceedings have been instituted in this court by the second lienors. The mortgagors, owners of the premises, acquiesced in the decree of the district court and do not complain of the judgment.

The first contention of plaintiffs in error is that the money loaned to the owners of the lots by the association was advanced for the purpose of promoting the erection of the buildings on the lots in controversy, and that consequently the mortgage taken to secure this advance should be held an inferior lien to the claims of the mechanics and material men. It is conceded that the mortgage was executed and recorded before any contract for building or repairs was entered into. It is also shown by the record that when the owners of the lots applied to the association for the money, they stated in their application that the money was to be used for the purpose of erecting buildings upon the lots. It is also shown that some of the money advanced by the association was used for the purpose of paying for the erection of the buildings and that some of the money was paid direct to the mechanics and material men on orders given by the mortgagor upon the mortgagee. It is also shown that one of the agents and officers of the association frequently visited the buildings during the time of their erection and had knowledge in a general way of the amount of money that was being expended for the improvements. There is also some evidence that tends to show that this officer of the association suggested to the owners of the property that if the amount of money al-

ready loaned was not sufficient to pay for the improvements on the premises he would recommend a further loan for that purpose, and that in conformity with this agreement he did recommend an additional loan after the contracts had been let and the buildings partially or fully completed. That when he found the amount of money it would take to fully complete the work his company declined to loan more than \$175 on defendants' last application. The lien for the amount last advanced was held by the trial court to be inferior and junior to the liens of the mechanics and material men, and as to this part of the judgment no complaint is made.

The question then to be determined is, do these facts show that the association was a promoter of the erection of these buildings so as to bring this case within the rule announced in *Bohn Manufacturing Co. v. Kountze*, 30 Neb., 719; *Millsap v. Ball*, 30 Neb., 728, and *Cummings v. Emslie*, 49 Neb., 485? *Bohn Manufacturing Co. v. Kountze* and *Millsap v. Ball* are both based upon a contract for the sale of the land wherein it was stipulated as a part of the purchase contract that the buildings should be erected. The proper rule to be deduced from these cases is as stated in *Hoagland v. Lowe*, 39 Neb., at page 412, that where "a vendor of real estate, holding or owning the legal title, authorizes or requires the vendee to erect improvements upon the premises, * * * the lien of laborers or material men, who perform labor or furnish material for the improvements, will attach to the interest of both vendor and vendee and be prior to the lien of vendor for unpaid purchase money." It is apparent that the facts in the case at bar clearly take it without the rule announced in these cases, for the mortgagee in this case was not the owner of the property on which the improvements were erected and only loaned money to the owner for the purpose of enabling him to make the improvements. In *Cummings v. Emslie*, *supra*, the facts showed that the mortgagee had agreed to take a lien second to that of the incumbrancers for all the money he had advanced for the purpose of mak-

solely for the benefit of the mortgagor and that other parties can not be interested in them.

It will be observed that the mortgagee in this cause of action did not in the first instance seek a foreclosure of his lien but that he was brought into the case at the suit of another lienor and asserted his mortgage in an answer and cross-petition. While as against the mortgagor the fact that the mortgagee was brought into the suit as a defendant would not cure the admission to allege in his cross-petition and prove that no action at law had been brought for the collection of the mortgage debt; we think, however, that a different rule should obtain in a contest between lienors. Section 851 of the Code provides in substance that where a judgment has been obtained in a suit at law for the money demanded or any part thereof, no proceedings shall be had in such case to foreclose the mortgage until an execution has been returned unsatisfied in whole or in part showing that the defendant has no property from which to satisfy the judgment, except the mortgaged premises. It was held by this court in construing this kindred section of the statute in *Simmons Hardware Co. v. Brokaw*, 7 Neb., 405 that the provisions requiring the return of an execution unsatisfied before proceedings to foreclose could be maintained were enacted for the benefit of the debtor and that in a contest between lienors in which the senior mortgagee was made a defendant, the junior mortgagee could not complain because this allegation was not proven. We see no good reason for extending the rule requiring proof of the allegation that no action at law has been maintained in a suit to foreclose a mortgage beyond the scope that it has already been given by this court.

In each of the cases in which a reversal has been ordered because of the failure of this technical proof, it has been done on complaint made by the debtor and mortgagor. Even if an action at law had been maintained by the mortgagee in the case at bar, such fact could not affect the priority of his lien and unless as a result of such fact he

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Nebraska, and delivered to Heagney on July 30, 1901, on which day the notes and mortgage securing the same bear date. Heagney used the machine until September 9, 1901, the evidence being undisputed that thirteen days' actual threshing was done with it. Under date of September 9, 1901, one Sloan, an attorney at Geneva, wrote the company, directing his letter to Lincoln, Nebraska, stating that the machine did not work satisfactorily, and also complaining that the company had not sold his old machine; that he now had two machines on hand, and asking the company to take back the new machine and return his papers. The letter also stated "that unless you will notify him where you prefer the machine to be left he will bring it and leave it at the office of Mr. Talmage or at the depot subject to your order."

One Ed Coleman, general agent of the company, replied to this letter, stating, in substance, that it was the first intimation received by the company of any dissatisfaction on the part of Heagney, and directing attention to the contract of sale entered into between the parties, and declining to take back the machine. Heagney kept possession of the machine and did not return or offer to return it to the company or any of its agents. In November, about the time of the maturity of the first note, and again in December some time after it fell due, one Tolman, an agent of the company, called on Heagney and demanded payment, which was refused by Heagney, and shortly afterward the company brought replevin for the property covered by its chattel mortgage and took possession of the same under the writ. The answer of the defendant is a general denial. On the trial of the case the company called Heagney as a witness and identified the notes and mortgage, introduced these papers in evidence and rested, and thereupon Heagney requested the court to direct a verdict for him, which motion was overruled.

It is now insisted that the court should have instructed the jury to return a verdict for the defendant for the reason that it was not shown that anything was due upon the

It is further urged that the petition does not state a cause of action because there is no allegation that the debt secured remains unpaid. It is evident that counsel have overlooked the following allegation of the petition: "That one of the notes hereinbefore mentioned and described and secured by said chattel mortgage became due and payable on the 1st day of November, 1901, and that the same has not been paid and the defendant refuses to pay the same and the plaintiff does now elect to treat all of said indebtedness as due and payable and hereby declares the same due and payable."

Exceptions were taken to the ruling of the court upon its refusal to allow evidence offered by the defendant below. Some of this evidence went to conversations with alleged agents of the company, and some to proof of damages sustained by Heagney because of the claimed failure of the machine to do proper work. The contract of sale contained a stipulation as follows: "Agents have no authority to waive, alter or enlarge this contract or to make any new or substituted or different contract or warranty." Whether or not a general agent of the company having general authority in the transaction of its business might waive or modify the conditions of the contract it is not necessary to inquire. No offer was made tending to show a waiver or modification of any of the conditions of the contract coming from a general agent of the company, and no special or local agent could, in the face of the contract itself, modify or waive any of its terms. The claim that Heagney was entitled to prove damages and to offset them against his notes, is met by the provisions of the contract itself which specially provide against such a proceeding.

It is further urged that there was no evidence of any consideration for the notes and mortgage. Aside from the presumption that obtains in favor of a consideration for paper of this character, Heagney admitted upon the trial that he gave the notes and mortgage to evidence the purchase price of the machine bought from the company. He further testified that the separator and stacker "in the

Sycamore v. Sturm, 13 Neb., at page 215; *Clark v. Decring & Co.*, 29 Neb., 293.

In *David v. Gosser*, 41 Kan., 414, it was held: "Where a threshing machine is sold upon a written contract, and one of the conditions contained therein is that if the machine does not do good work the purchaser shall return the same to the place where received, *held*, before the purchaser can recover damages, he must show a return of the machine or an offer to return the same, or a waiver on the part of the seller of such requirement."

The defendant below apparently tried his case upon two theories entirely inconsistent one with the other; first, that the contract of sale had been rescinded and that no recovery could be had on his notes because of such rescission, and, second, that he was entitled to damages on an executed contract for the sale of the machine.

It is hardly necessary to observe that the law could allow him no damages growing out of a contract which he himself had rescinded, or that by the terms of his contract he could rescind only by returning the machine to the agent from whom he purchased; and the contract which he signed with full knowledge of all its conditions contains this stipulation: "and the purchaser expressly waives all claim for damages on account of the nonperformance of any of the above described machinery."

The contract appears to have been entered into with a full understanding of all its terms and conditions, and the court has no power to alter or change it in any respect or to relieve either of the parties from full performance. The plaintiff in error has barred his right to claim damage for failure of the machine to do good work and has failed to take advantage of the right given him to rescind the contract.

We discover no reversible error in the action of the district court and recommend an affirmance of its judgment.

KIRKPATRICK and POUND, CC., concur.

AFFIRMED.

Opinion on rehearing follows.

possession in the plaintiff, but the judgment awards the right of possession only. The rendition of a verdict in such cases is a mere formality in which the jury perform no real function. It was held by this court in *Zittle v. Schlesinger*, 46 Neb., 844, that it is not reversible or prejudicial error to dispense with it entirely in cases in which a peremptory instruction may properly be given. It would be absurd to hold that an error in the form of that which is without legal importance would upset an otherwise valid judgment. It is further insisted that the judgment is erroneous because of want of sufficient evidence that the mortgage debt was not paid, but we concur with the former opinion in this regard. The debt was evidenced by notes, payable to the mortgagee, which were produced from his possession on the trial. This would have been *prima facie* evidence that they remained unpaid in any other form of action, and we can see no reason why it should not be so in actions like the present. Presumably when a debtor pays a note he obtains possession of it or of some other evidence of the fact, which he can produce when the occasion requires.

It does not appear to us that any useful purpose would be subserved by repeating, in substance, the reasonings and conclusions contained in the former opinion concerning the remaining questions involved in the case. It is sufficient to say that the argument on rehearing is confined to a criticism of them which does not seem to us to be sound, and that a further discussion of them would not, in our opinion, be fruitful of benefit or advantage to anyone.

It is recommended that the former decision of this court be adhered to and the judgment of the district court affirmed.

HASTINGS and OLDHAM, CC., concur.

AFFIRMED.

Chase v. Nebraska Chicory Co.

CHARLES H. CHASE V. THE NEBRASKA CHICORY COMPANY
OF SCHUYLER, NEBRASKA.

FILED JULY 3, 1903. No. 12,985.

Commissioner's opinion. Department No. 3.

Corporations, Manufacturing: STATUTES. *Bolton v. Nebraska Chicory Co.*, — Neb., —, 96 N. W. Rep., 148, followed.

ERROR from the district court for Colfax county.
Tried below before HOLLENBECK, J. *Affirmed.*

George H. Thomas, for plaintiff in error.

The statutory provision does not contain the word "exclusive," but the uniform holding is that manufacturing must be the exclusive object. *St. Paul Barrel Co. v. Minnesota Distilling Co.*, 64 N. W. Rep. [Minn.], 1143; *First Nat. Bank v. Winona Plow Co.*, 59 N. W. Rep. [Minn.], 997; *Densmore v. Red Wing Lime & Stone Co.*, 48 N. W. Rep. [Minn.], 528; *Arthur v. Willins*, 46 N. W. Rep. [Minn.], 851; *State v. Minnesota Thresher Mfg. Co.*, 41 N. W. Rep. [Minn.], 1020; *Mohr v. Minnesota Elevator Co.*, 41 N. W. Rep. [Minn.], 1074.

Everitt & Wertz, contra.

The defendant in error was a manufacturing corporation within the purview of the statute relating to manufacturing companies (section 38, chapter 16, Compiled Statutes, 1901; Annotated Statutes, section 4139). Definition of "manufacture": *Anderson's Law Dictionary*; 14 Am. & Eng. Ency. Law [1st ed.], 269; *Engle v. Sohn*, 52 Am. Rep. [Ohio St.] 103, and note, page 107; *Lawrence v. Allen*, 12 U. S. [L. Ed.], at page 917; 19 Am. & Eng. Ency. Law [2d ed.], 922.

The Minnesota cases cited by plaintiff in error are not contrary to the contention of defendant in error, since they universally except the things which are necessary to and connected with the business of manufacturing, even

while adhering to the strict construction of the constitutional provisions to the effect that "each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him."

Case holding a corporation to be a manufacturing corporation although not doing exclusively a manufacturing business: *Cuyler v. City Power Co.*, 76 N. W. Rep. [Minn.], 948.

Our own court is already committed to the doctrine that if the primary or principal object of the corporation is manufacturing, the engaging in other lines of business connected therewith does not take the corporation out of the statute relating to manufacturing companies. *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb., 279; *Lincoln Shoe Mfg. Co. v. Seifert*, 44 Neb., 536.

POUND, C.

While another point is raised, the question decided in *Bolton v. Nebraska Chicory Co.*, — Neb., —, 96 N. W. Rep., 148, suffices to dispose of this case also. We therefore recommended that the decree be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

AFFIRMED.

NOTE.—The syllabus in the case of *Bolton v. Nebraska Chicory Co.*, cited in the above opinion is as follows: "A corporation organized to 'plant, harvest, store, purchase, manufacture, market, sell and deal in chicory,' held, a manufacturing corporation, within the purview of section 27, chapter 16, page 380, Compiled Statutes, 1901."—REPORTER.

Cooper v. Village of Waterloo, 74 N. W. Rep. [Wis.], 115; *McGinty v. City of Keokuk*, 24 N. W. Rep. [Ia.], 506; *Bohl v. City of Dell Rapids*, 91 N. W. Rep. [S. Dak.], 315; *Mau v. Morse*, 33 Pac. Rep. [Colo.], 283; *Barce v. Shenandoah*, 76 N. W. Rep. [Ia.], 747; *Knapp v. Jones*, 50 Neb., 490; *Garabanati v. City of Durango*, 70 Pac. Rep. [Colo.], 686; *Collins v. City of Janesville*, 87 N. W. Rep. [Wis.], 241; *Raynor v. City of Wymore*, 3 Neb. [Unof.], 51.

J. M. Kerr and Martin Langdon, contra.

If defendant in error were exercising ordinary care in traveling over said sidewalk, he would be entitled to recover, notwithstanding he had been over the sidewalk that day and had seen it several times before the accident occurred. *City of Lincoln v. Walker*, 18 Neb., 244; *City of Omaha v. Ayer*, 32 Neb., at page 386.

The city cannot avoid its liability for its own negligence, providing the plaintiff was exercising ordinary care while traveling on the sidewalk. *City of Omaha v. Jensen*, 35 Neb., 68; *City of Lincoln v. Calvert*, 39 Neb., 305. The fact that a defect in a sidewalk is concealed by a recently fallen snow does not release the city from liability. *The City of Omaha v. Randolph*, 30 Neb., 699.

ALBERT, C.

This is an action for damages for personal injuries alleged to have been sustained by the plaintiff by reason of the defective condition of certain sidewalks of the defendant city. The petition is in the usual form and does not require further attention at this time. The answer, among other things, contained a denial of the injuries and allegations showing contributory negligence on the part of the plaintiff. The affirmative matter in the answer is denied in the reply. There was a verdict and judgment for the plaintiff and the defendant brings error.

The principal complaint of the defendant is based on the refusal of the court to give certain instructions, the first of which is as follows:

a street does not, of itself, establish negligence on the part of a traveler who is injured in consequence of such defect. *Nebraska Telephone Co. v. Jones*, 60 Neb., 396. That a traveler voluntarily attempts to pass along a highway, with knowledge of some defect therein, is not, ordinarily, conclusive evidence of a want of due care, but is merely one of the circumstances to be taken into account by the jury in determining whether he exercised such care as a reasonably careful and prudent man would have exercised under like circumstances. Elliott, *Roads and Streets* [2d ed.], section 636. Whether the plaintiff in the present case exercised due care was clearly a question for the jury, and the court properly refused to withdraw that question from their consideration.

It also complains of the refusal of the court to give the following instruction:

"The jury are instructed that a person has no right knowingly to expose himself to danger and then recover damages for that which he might have avoided by the use of reasonable precaution, and if the jury believe from the evidence that there was a defect in the sidewalk and that it was dangerous and that the plaintiff, before and at the time of the alleged injury, knew of the defect in the sidewalk and knew that by passing over that part of the sidewalk space immediately west of the alleged defect he could have avoided all danger to himself, you will take that knowledge into consideration in arriving at a verdict, and if you believe that by the exercise of ordinary care and prudence the plaintiff might have avoided injury by passing over the ground on either side of the defect, then you will find for the defendant."

As a general statement of the law, applicable to the facts in this case, we think the foregoing instruction is, perhaps, correct. But the instruction leaves it somewhat indefinite as to what facts would excuse the plaintiff for his failure to pass to one side of the defective portion of the walk; had it been given it would have been proper for the court to indicate, as far as the evidence would justify,

complaint made of it either in the petition in error or the brief. Hence, the qualifying clause stands as a part of the accepted law applicable to the facts in this case. Moreover, we think it was justified by the evidence, because it might reasonably be inferred therefrom that the plaintiff's attention was momentarily attracted elsewhere by the storm, the darkness, snow, or other causes, or that the defect was so hidden by the darkness or covered by the snow, that he was misled. We are satisfied that the instruction given is as favorable as the defendant had a right to ask and that it was not error to refuse the second instruction tendered.

Another reason urged for the reversal of this case is that there is a variance between the pleadings and the proof. This point is not made very clear. It seems to be based exclusively on the ground that while the petition shows that, at the place where the injuries occurred, the boards from the sidewalk were taken up for the space of from twenty to thirty feet, the evidence shows the hole or defect in the walk, which caused the injury, was from but two to four feet in width. We do not understand counsel to claim that it would be necessary to show a defect of the exact dimensions alleged in the petition, but rather, that the only inference to be drawn from the petition and the evidence is that the injury must have occurred at some other place than that alleged in the petition. We are unable to concur in that view. The evidence is amply sufficient to show that the injury occurred at the point alleged in the petition. It is true, as stated by the defendant, that in order to permit the verdict and judgment in this case to stand, we must accept the testimony of the plaintiff as true, because no other person was present when the accident occurred. It is also true that there are some slight discrepancies in his testimony, but no more than usually occurs in the testimony of a witness detailing an occurrence of that kind, and they are in regard to immaterial matters. There is nothing to indicate that his testimony was willfully false in regard to any material point,

said county. It is disclosed by the pleadings that appellee, George P. Horn, is the owner and in possession of the southwest quarter of section 14, township 18 north of range 5 west in Boone county; that appellants, Zena A. Williamson, Barsly Hubbell and James A. Smith, are the commissioners, that David Westbrook is one of the road supervisors of Boone county; that appellee had constructed, and for many years had maintained, a fence along the west line of his land; that appellant Westbrook, acting as road supervisor, had, under the direction of the other appellants as county commissioners, served notice upon appellee to tear down and remove the fence from his west line and that if he failed so to do Westbrook, as road supervisor, would himself remove the fence and the expense of so doing would be collected from appellee. It is further disclosed that Westbrook, as supervisor, was about to tear down the fence and remove it, and would have done so had he not been temporarily enjoined from doing so by the county judge of Boone county. Appellants attempted to justify the proposed action upon certain proceedings claimed to have been had by the county commissioners some time in the year 1885, which it is claimed amounted to the laying out and establishing of a public road along the section line in question.

The only action ever taken in the matter by the board of county commissioners is disclosed by the record of the commissioners, which is in the language following: "Before the board of county commissioners of said county, May term, 1885, at a regular meeting of the county commissioners of said county, held at Albion, on the first day of May, 1885. Present: Peter J. Files and J. J. Young, county commissioners, and John Peters, county clerk, the following, among other proceedings, were had: Come now William Floy and others, and present a petition to examine and to locate a county road called 'Road No. 168,' which said petition is in the words and figures following, to wit:" etc. The commissioners' proceedings fail to show any action of any kind taken on this petition, but it does

lay out and establish a public road along the section line as contended, there has been a traveled road along the section line for a sufficient length of time to establish a road by prescription. This contention seems to be wholly without merit. The testimony establishes almost beyond dispute, as found by the trial court, that there has been no travel along the line mentioned. It is shown that for a considerable portion of the distance along the section line the land is so rough and broken as to be wholly impassable and that what little travel passes along near the line follows the canyons around there, and the farms on either side, without regard to the section line. It is further shown that appellee has maintained his fence along that line for sixteen years. The judgment of the trial court seems to be right, and it is recommended that the same be affirmed.

DUFFIE and POUND, CC., concur.

AFFIRMED.

ESTATE OF SIDNEY E. WOLCOTT, DECEASED, v. THE MCCORMICK HARVESTING MACHINE COMPANY.

FILED JULY 3, 1903. No. 12,999.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: TRANSCRIPT INCOMPLETE: DIMINUTION: JURISDICTION OF DISTRICT COURT.** Defendant in error appealed from judgment rejecting its claim against the plaintiff in error. The plaintiff in error moved the district court to dismiss the appeal because the transcript brought up was not complete, instead of suggesting diminution of the record. *Held*, That the court has jurisdiction and did not err in overruling the motion.
2. **Trial: DIRECTING VERDICT: EXECUTORS AND ADMINISTRATORS.** Record examined, and *held* to show no error on the part of the trial court and that it properly directed a verdict for defendant in error.

ERROR from the district court for Webster county
Tried below before ADAMS, J. *Affirmed*.

Overmann & Blackledge, for plaintiff in error.

Doyle & Berge and *Fred Maurer*, contra.



over-zealous in the matter of bringing up record. We have before us a transcript of the petition and amended petition, the answer and amended answer, and even certified copies of subpoenas and other useless papers. This practice makes needless costs, fills the archives of the clerk's office with useless paper, and makes unnecessary work for the reviewing court. Attorneys should endeavor to bring up "just enough, and not any too much" of the record.

We recommend that the judgment of the lower court be affirmed.

BARNES and ALBERT, CC., concur.

AFFIRMED.

SYLVESTER CHESLEY V. ROCHEFORD & GOULD.

FILED JULY 3, 1903. No. 13,011.

Commissioner's opinion. Department No. 1.

- 1. Trial: DIRECTING VERDICT: SUBMISSION TO JURY.** In an action at law where the right to recover depends upon testimony from which reasonable minds might draw different conclusions, the cause should be submitted to the jury. But where only one conclusion can be drawn from the evidence, the court should direct a verdict.
- 2. Licenses: DUTY OF LICENSOR TO LICENSEE: DAMAGES: PERSONAL INJURIES.** Where one enters upon the premises of another with his consent but without an invitation and not in the discharge of any public or private duty, he is a bare licensee and the occupier of the premises owes no duty to him as long as no wanton or willful injury is inflicted upon him by the licensor or his servants.
- 3. Licenses: PERSONAL INJURIES: EVIDENCE SUFFICIENT.** Plaintiff's evidence examined, and *held* to show that he was at the time of the injury complained of a bare licensee on defendant's premises.

ERROR from the district court for Douglas county.
Tried below before **FAWCETT, J.** *Affirmed.*

E. T. Farnsworth and Smyth & Smith, for plaintiff in error.

Even if defendants' theory were correct, and plaintiff a trespasser, defendant owed him the duty of ordinary

Chesley v. Rocheford & Gould.

York C. R. Co., 30 Barb. [N. Y.], 229; *McKenna v. Citizens Natural Gas Co.*, 47 Atl. Rep. [Pa.], 990; *Corby v. Hill*, 4 C. B., N. S., 554.

It is hardly to be expected that workmen will not move a little while they are engaged about their work. And if they are exposed to danger from defective machinery of which they are unaware, the question is whether they were in a position such as without carelessness they might reasonably and naturally be expected to occupy, and not improper for a person so employed. This is a question of fact for the jury. *Hackett v. Middlesex Mfg. Co.*, 101 Mass., at page 104; 1 Wood, Nuisances, section 109; *Ash v. Mill Co.*, 24 Minn., 501; 1 Shearman and Redfield, Negligence, section 702; *Scott v. The London & St. Katherine Docks Co.*, 3 H. & C., 596; *Baumeister v. Markham*, 101 Ky., 122; *Gilbert v. Nagle*, 118 Mass., 278; *Spry Lumber Co. v. Duggan*, 80 Ill. App., at page 398; *Isherwood v. Jenkins Lumber Co.*, 87 N. W. Rep. [Minn.], 931; *The Parkinson Sugar Co. v. Riley*, 50 Kan., 401; *Melvin v. Pennsylvania Steele Co.*, 180 Mass., 196; *Boyle v. Columbian Fireproofing Co.*, 64 N. E. Rep. [Mass.], 726; *Missouri, K. & T. R. Co. v. Edwards*, 67 S. W. Rep. [Tex.], 891; *Lovejoy v. Campbell*, 92 N. W. Rep. [S. Dak.], 24; *Omaha & R. V. R. Co. v. Morgan*, 40 Neb., 604.

The plaintiff assumed the risk incident to the business in which he was engaged, and no other. *Connolly v. Davidson*, 15 Minn., 428; *Svenson v. Atlantic Mail Steamship Co.*, 57 N. Y., 108; *Johnson v. Tacoma Mill Co.*, 60 Pac. Rep. [Wash.], 53; *Union Warehouse Co. v. Prewitt's Adm'r*, 50 S. W. Rep. [Ky.], 964; *McDonald v. Union P. R. Co.*, 42 Fed. Rep., 579; *Sullivan v. The Tioga R. Co.*, 112 N. Y., 643; *Fox v. Kinney*, 44 Atl. Rep. [Conn.], 745.

The care which one owes to another is by no means dependent upon contractual relations between them, although the obligation of care often arises from contract supplementing or enlarging the duty otherwise imposed by law. *Appel v. Eaton & Prince Co.*, 71 S. W. Rep. [Mo.], 741.

If, by the carelessness of those in charge of a train while

who had charge of the brickwork on the piers of one of the structures called the "Oleo" building, and also were laying brick on the east wall of that building at the time of the injury complained of. From eight to sixteen feet east of the piers of the "Oleo" building a gang of carpenters in the employ of Armour, and not of Rocheford & Gould, were engaged in flooring a reservoir about ten feet deep, fifty feet wide and 250 feet in length. Among these carpenters was the plaintiff, Chesley, who had been in Armour's employ for some time previous, but commenced work on the reservoir the day he was injured. The floor of the elevator and the ground west of it, on which defendant's men were working on the piers, were practically on the same level and thirty or forty feet below the level of the street. For the purpose of getting brick down to its men working on the piers, defendant used a rough cable hoist or elevator on which a wheelbarrow of material would be lowered from the street to the ground near the pier where the brick was being laid. This elevator was double so that while a wheelbarrow of brick was descending an empty wheelbarrow was ascending for another load; it was propelled by power, and was in use continuously during working hours. The framework around the elevator was stayed by cross braces eight to ten feet apart. Wheelbarrows were placed in the elevator from the north and south sides, which were open and unprotected. The employes of Rocheford & Gould were supplied with water from a bucket which was placed in the shade of the elevator, and, at the time of the injury complained of, the afternoon of July 23, the bucket was on a rock some six or eight feet north of the center of the hoist and perhaps a little to the west. The carpenters who were at work on the reservoir were supplied with water by men or boys sent around among them for that purpose by Armour's foreman. The afternoon of the injury was very warm and the water boys, as they were called, did not come around as frequently as desired among the carpenters to supply their thirst. Consequently, as appears from plaintiff's testi-

half and made no claim that he went in search of boards or tools at the time of his injury, but that at each of the former hearings he alleged that he saw the water bucket on the stone and went there because he was thirsty and because the water boys did not come around as often as they should to supply the carpenters. Defendant's evidence also tended to show that there were no pieces of boards or tools of the carpenters anywhere near the elevator; this evidence, however, was disputed. The court, after the testimony was all in, directed a verdict for the defendant, and plaintiff brings the cause here on error.

As a verdict was directed for defendant in this case, we must examine the action of the trial court in the light of the evidence introduced by plaintiff and dismiss from our consideration all questions on which there was a substantial conflict of testimony, because if the right to a verdict on defendant's behalf depended on any question in which reasonable minds might differ the cause should have been submitted to the jury, and a peremptory instruction for defendant should not have been given. We must examine this case then from plaintiff's theory to determine what relation he occupied toward the defendant and what duty, if any, defendant owed him. The elevator causing the injury was erected for the sole use and benefit of defendant's employees on private premises which defendant was rightfully occupying and twenty or thirty feet below the level of the street, where no duty was imposed to provide generally against dangers to the traveling public and in fact where the public had no right to travel. The water bucket in front of the elevator was placed there for the sole use and benefit of defendant's men and not for the use and benefit of the carpenters working on the reservoir. Plaintiff at the time the injury occurred was not in the ordinary discharge of his duty even if, as he contended on the last hearing of the case, he started from his work with the idea of picking up a piece of plank or some tool which he was using, for he was not injured while doing this, nor could he have been injured, from his own evidence, if he

was received; consequently, he was either there as a volunteer or by invitation. There is no claim of a direct invitation to come upon these premises. Then is there any evidence tending to show an implied invitation? We are aware of the fact that it has been held with reference to children of tender age that an invitation may be implied to enter upon the premises by placing something particularly attractive near to and in plain view of places where they are accustomed to congregate. But this rule is restricted to young children and others not fully *sui juris*. Cooley, Torts, p. 303. Had the water bucket been placed near the hoist to supply both the carpenters and the masons with water this would clearly have been an invitation to all to go there, and it would have entailed upon the defendant the duty of exercising reasonable care to protect all from injury while there. So likewise if the employees had necessarily passed close to the elevator in going to and returning from their employment, it would have been the duty of defendant to have constructed his elevator in view of the safety of the parties who in the line of their duty necessarily passed near by it. But as the water bucket was only kept for the use of defendant's men and as the carpenters with whom plaintiff worked were otherwise supplied with water and as plaintiff was neither going to nor returning from his place of business at the time of the injury, we are compelled to conclude that he was a bare licensee on the premises of defendant and that his only right of action against the defendant would be for a wanton or intentional injury inflicted upon him by defendants or their employees. *Gillis v. The Pennsylvania R. Co.*, 59 Pa. St., 129, 98 Am. Dec., 314.

In this view of the matter, we think the trial court was justified in directing a verdict for the defendant, and we recommend that its judgment be affirmed.

HASTINGS and AMES, CC., concur.

AFFIRMED.

Opinion on rehearing follows

Chesley v. Rocheford & Gould.

assailed in a motion for rehearing and at the request of the writer of the former opinion another examination of the record has been made.

The rehearing was asked because the former opinion was wrong in saying the water-pail was probably west of the hoist; wrong in saying that defendant had exclusive control of the ground around the hoist; wrong in saying that plaintiff went to get a drink; wrong in saying he would have suffered no injury if he stayed where his tools and material were; wrong in stating his position at the time of the injury and in saying that no willful injury is claimed. It was asked, also, because the opinion ignored the fact that the water-pail, and plaintiff while drinking from it, stood in a well-marked path used by carpenters, as well as brickmen, that the ground around the hoist was used by all the workmen in common, that the hoist was sometimes used by Armour's men. It is also claimed that plaintiff's own testimony is given no weight and his theory of the case ignored.

It will be seen from the matter claimed to be misstated and ignored in the former opinion, that the conclusion which is disputed is the holding that plaintiff was a bare licensee with no rights except that of not being willfully injured or by negligence so gross as to be equivalent to willful injury. The complaint that the former opinion is wrong in saying that willful injury is not claimed is unfounded. It is true that plaintiff's petition contains such an allegation. There is absolutely nothing to sustain it. Negligence in building a brick hoist without enclosing its sides and carelessness in placing on it an empty wheelbarrow in such a manner that it fell off, presumably because of the handles coming in contact with braces on the hoist's framework, are all that is claimed to be shown by the evidence.

The sole question to be considered at this time is the soundness of our former conclusion, that plaintiff was a bare licensee, going on these premises without necessity on his part or invitation or notice on defendant's, for whose

break joints in the covering. While there he saw the pail and stepped up to it and was in the act of drinking when struck down, he did not know by what.

There is some denied evidence that Armour's men were still excavating for the "Oleo" building or adjoining it on the west. There is considerable evidence that the carpenters on the reservoir were using this drinking-pail that day. It was a hot day and their own "water boy" was remiss. There is no evidence that defendants or any one having authority from them over the matter knew it; their foreman on the brickwork testifies to warning plaintiff, but this is denied.

There is the testimony of one witness that on one occasion Armour's men used the hoist to elevate some dirt, and several of them testify that they used it to ride up and down on. It appears, and is not denied, however, that there was a sign forbidding such use of it. There is testimony that there was a path leading from it towards the north past the pail. There is nothing to show that this was a public path, and the fact, which is undisputed, that the wheelbarrows were wheeled away towards the north, accounts for that. There is nothing to show that any use of such a path was made by the carpenters in going to a privy. There is evidence that the carpenters used a dirt pile towards the north end of the "Oleo" building's foundations as "a kind of a privy." The extent of such use is not indicated.

The cases cited in the plaintiff's briefs, mainly railway cases, requiring one who is conducting a business manifestly dangerous to the licensees to take additional precautions after giving license to go upon his premises, do not seem applicable here. In such cases to continue to drive their trains at full speed and without warning after permitting the public on their right of way would be in the nature of a wanton injury. In the present instance there was no invitation of plaintiff within dangerous proximity to the hoist. Defendant's possession and control of the premises seem to have been sufficient as against

court granting a peremptory writ of mandamus against the members of the board of fire and police commissioners of the city of Omaha, requiring said board to convene and appoint a day for hearing the protests, remonstrances and objections of the relator, John D. MacRae, against the issuance of a saloon license to Charles Metz, also respondent in the action, and requiring said board to revoke the license which had already been granted until such hearing.

There is practically only one contention on the part of the plaintiffs in error relied upon to secure a reversal, and that is, that the protest, remonstrance and objection to the granting of such license, made by the relator and brought to the attention of the defendant board, was not "filed" with the board.

The answer filed by the members of the board contains the following: "Further the said respondents deny that any protest or remonstrance has ever been filed with this board as by law required." The answer of Charles Metz contains the following: "And denies that the said relator at any time filed, or asked to be filed, any remonstrance or protest against the granting of said license."

The license in question was granted on the 18th day of December, 1902, and the relator, who is a person entitled to be heard in opposition to the granting of such license, wrote and sent by mail in such manner that the same was received by the clerk of the defendant board on the 17th day of November, the following communication:

"OMAHA, NEB., Novr. 15, '02.

"To the Honorable Board of Fire and Police Com's of City of Omaha, Neb.

"DEAR SIRs: As owner and a resident of 810 So. 27th St., I protest against a license being granted to Mr. Chas. Metz to do business at 2705 Leavenworth St.

"Ever since he has had a saloon there he has been a violator of the law; curtains are never removed at any time of day from the windows, and it is kept open for business every Sunday. I hope you will give me a hearing and an

protest filed, and the clerk stating to the board that there was a letter of J. D. MacRae's, dated November the 15th, 1902, but the board finding that the same was not filed or any request made to file the same, thereupon approved the bond, granted the license, and ordered the same issued. And the said board ordered the clerk to preserve in the files of this office said letter.' Thereupon the board adjourned."

Some errors of law occurring at the trial are alleged in the petition in error, but in the condition of the record only one of the assignments is entitled to be considered. The respondents offered to prove to the trial court, "that the plaintiff in this case for several years last past prior to the year 1902, has been in the habit and custom of sending written communications to said board protesting against the granting of a license at No. 2705 Leavenworth Street; and that the said plaintiff in each of said cases never appeared before said board, never asked for a time to be fixed for a hearing, and never followed the matter up in any manner whatsoever, except by sending said written communications." This offer was rejected and we think properly so. The evidence has no bearing upon the issues in this case; the good faith of the board in the matter complained of is not in issue.

No contention is made by plaintiffs in error that the letters copied above are not sufficient in form and substance to have required the board to appoint a day for hearing thereon, under the requirements of section 3 of chapter 50 of the Compiled Statutes [Annotated Statutes, section 7152], relating to the granting of such licenses, and the only question to be determined is as to whether the papers should be considered as "filed" within the meaning of the law. That they were received in due time and called to the attention of the board, and that the board recognized their presence, and noted the same upon its records, is undisputed.

It seems that the relator called at the office of the clerk of the board on the 20th day of November, and was told that his first letter had been received and that he saw it



C. Patterson and F. M. Harrington, for plaintiff in error.

N. K. Griggs, contra.

AMES, C.

Michael H. Fay was an experienced car repairer employed by the defendant railroad company at a gravel pit. Over and across one of the tracks of the company was a structure called a "trap," being a sort of raised platform upon which the gravel was carried and through a hole or trap in which the latter was precipitated upon cars successively standing and being loaded underneath. The general direction of the track was north and south. It extended northward from the trap about four hundred and fifty feet upon a grade inclining southwards at about one per cent. At the time of the accident hereafter mentioned, there were three loaded and three empty cars all coupled together and standing upon this incline where they had shortly before been placed by the defendant's trainmen. The three farthest from the trap were loaded and the remaining three were empty and so placed for the purpose of being loaded. The six cars were in immediate contact with each other. The empty car farthest south was in need of some repair and Fay had marked upon its side the words "bad order," but it is not shown that any of the other servants of the company knew of this fact, and we think it is immaterial. It is not shown that the arrangement of the cars was unusual or that Fay was ignorant of it. On the contrary it is shown that the methods employed were such as were usual and customary, and that Fay, who was a man of experience and good intelligence, must, from his long service in the capacity of repairer, have been familiar with them. On the north end of the third car northward from the trap was an employee of the company named Caffery. He was called a "spotter." It was his duty to loosen the brakes upon the empty cars

injuries to the latter, which he had repaired. It was also shown, without dispute, that it was the duty of the deceased, before going under a car standing on the track for the purpose of repairing it, to notify the "spotters" of his intention so to do, and to set the brakes, or to see to it that they were set, upon the car next above that which he was about to go under, and that he was provided with blocks to put under the wheels of the car to prevent its moving and with a flag to affix to the car to indicate that he was in a place of danger. It is also uncontradicted that he observed none of these precautions but that, on the contrary, he notified Caffery, in effect, that he had completed the repair of the car in question and that no further precaution with respect to it was called for. The dangers to which he was subject were obvious, and were to an important degree increased by his own lack of ordinary care and prudence. It is true, as counsel for the plaintiff urges, that the putting up of a flag or notification to Caffery, would not have prevented the violent movement of the car as a result of the collision, but the setting of the brake on the adjacent car, and the blocking of the wheels, had these things been done, would have had a tendency so to do, and had Caffery been notified he might, perhaps, have used greater care, or have warned the deceased against so rash an act as going under the car in its then dangerous position. It is difficult, if not impossible, to point with precision to the primary cause of the accident. As Fay must have known, it was customary and necessary, when leaving the cars in place upon the incline, to set but one brake on every second car so as to facilitate the putting of them in motion by means of their own gravity. That is, every alternate car depended by its couplings from the car next above it, which was held in place by a single brake doing service for both. That the cars so situated were in a state of very unstable equilibrium, extremely likely to be overthrown by any comparatively slight shock or disturbance, such as was incident to the detaching of cars from the train, must have been glaringly obvious to

SARAH C. FIGG V. JOHN P. HANGER ET AL.

FILED SEPTEMBER 17, 1903. No. 12,866.

Commissioner's opinion. Department No. 3.

1. **Malicious Prosecution: PROBABLE CAUSE: EVIDENCE SUFFICIENT: DIRECTING VERDICT.** In an action for malicious prosecution, if there is sufficient in undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant, although some of the facts bearing on that issue may be in dispute.
2. **Malicious Prosecution: PROBABLE CAUSE: INSANITY: EVIDENCE.** A finding by commissioners of insanity that a person brought before them is insane is *prima facie* evidence of probable cause for the proceeding, although not conclusive.
3. **Malicious Prosecution: PROBABLE CAUSE: INSANITY: PRESUMPTIONS: EVIDENCE.** While the plaintiff is not restricted to a direct attack, as, for instance, proof of fraud, collusion or perjury, but may establish want of probable cause by any form of competent and sufficient proof, the presumption arising from the finding of the commissioners in such a case must be overcome by evidence sufficient to destroy its probative force.

ERROR from the district court for Douglas county.
Tried below before FAWCETT, J. *Affirmed.*

E. S. Nickerson and George A. Magney, for plaintiff in error.

Wright & Stout, contra.


POUND, C.

Mrs. Figg was brought before the commissioners of insanity of Sarpy county at the instance of the defendants, and was adjudged "insane on the subject of religion" after a protracted hearing. She was afterwards released by the district court in *habeas corpus* proceedings. This action is brought to recover damages for malicious prosecution. The trial court directed a verdict for the defendant.

The testimony is voluminous and a great deal of time has been required to read it. Without going into details, it shows that no little bitterness existed between the

Figg v. Hanger.

parties as a result of Mrs. Figg's religious views and the methods by which she gave them utterance. So far as the question of malice is concerned, we think there was sufficient to go to the jury. But we think also that the trial court was right in directing a verdict upon the ground that there was no sufficient proof of want of probable cause. In general, the facts being shown, probable cause is a question for the court. *Maynard v. Sigman*, 65 Neb., 590, 91 N. W. Rep., 576. If there is sufficient in undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant, although some of the facts bearing on that issue may be in dispute. *Bechel v. Pacific Express Co.*, 65 Neb., 826, 91 N. W. Rep., 853. There is some dispute as to the sayings and doings of Mrs. Figg on particular occasions. But conceding all that her testimony shows on these controverted points, there remains a mass of undisputed testimony from which it appears clearly that her speech and conduct, when any matter of religion was raised, were violent and extravagant beyond the usual course of eccentricity. Moreover, great weight must be given to the determination of the commissioners of insanity. Undoubtedly their finding is not conclusive. But it is *prima facie* evidence of probable cause. The plaintiff is not to be restricted to a direct attack upon this determination, as, for instance, proof of fraud, collusion or perjury, but may establish want of probable cause by any form of competent and sufficient proof. *Bechel v. Pacific Express Co.*, *supra*. Nevertheless, the presumption arising from the finding of the commissioners in such a case must be overcome by evidence sufficient to destroy its probative force. *Maynard v. Sigman*, *supra*; *Nehr v. Dobbs*, 47 Neb., 863. All that is shown is that some things were testified to before the board which Mrs. Figg and her family dispute. Admitting that the witnesses were in error on these points, we do not think the finding would have been affected. The circumstances were mere details in a mass of evidence which undoubtedly moved the board from its whole tenor rather than by the force of any particular piece.



Merrill v. Van Camp.

We therefore recommend that the judgment be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

AFFIRMED.

H. A. MERRILL, APPELLEE, v. CHARLES L. VAN CAMP ET AL.,
APPELLANTS.

FILED SEPTEMBER 17, 1903. No. 12,958.

Commissioner's opinion. Department No. 1.

Taxation: FORECLOSURE: LAW OF THE CASE. This case having been decided upon a former appeal upon substantially the same record as that now before us, the former decision is adhered to.

APPEAL from the district court for Douglas county.
Tried below before KEYSOR, J. *Affirmed.*

Hall & McCulloch, for appellants.

H. P. Leavitt, contra.

AMES, C.

This is an action to foreclose the lien of a tax-sale certificate. The case was before this court at a former term, when it was held that the description in the certificate of the land sought to be affected was not so indefinite as to render the instrument void if the premises intended could be identified by extrinsic evidence. *Merrill v. Van Camp*, 1 Neb. [Unof.], 463, 96 N. W. Rep., 344. It was further held that, by the pleadings and the evidence contained in the record then presented, such an identification as was required had been made. A decree by the district court dismissing the action was therefore reversed and the cause remanded for further proceedings. Such proceedings were accordingly had that a decree of foreclosure and sale was rendered in accordance with the opinion of this court. From this latter decree this appeal is prosecuted.

It is not pretended that the identification by the record

court for Douglas county, praying for a foreclosure of a mechanics' lien on lot 8, block 7, Logan Place Addition to South Omaha, which it alleged had been assigned to it by one George W. Briggs. The Bankers' Building and Loan Association, appellant herein, was made a party defendant in that suit. On September 11, 1901, the appellant filed a petition in the same court praying for the foreclosure of its mortgage on the same property, and made the appellee a party defendant. Each party filed an answer and cross-petition in the case in which it had been made a defendant, setting up its claim and praying that the same be decreed to be a lien prior to that of the other party. Afterwards, by consent of the parties and the order of the court, the two actions were consolidated. There was a trial to the court, and the appellee, the Bradford-Kinsler Lumber Company, was decreed to have a first lien for the sum of \$109.20 and a foreclosure of the mechanics' lien described in its petition, and the appellant was decreed to have a second lien on the premises for the sum of \$685.04 and the foreclosure of its mortgage. The premises were ordered sold to satisfy these amounts, and the case comes here on appeal by the Bankers' Building and Loan Association.

The only question in the case is whether or not the evidence is sufficient to sustain the findings and judgment of the trial court. It appears that one B. A. Page was the owner of the premises described above, and that in July or August, 1899, he made a verbal contract with one George W. Briggs for the erection of a house thereon, for which he was to pay \$635; that Briggs commenced the erection of the house sometime in September, and had it so far finished on the 5th of November following that Page, with his family, moved into it, and from that time on occupied it as a family residence. At that time the building was not completed according to the contract, but nearly all the work uncompleted was done during that month. Sometime in the winter following the parties got together and agreed on the amount due on the contract, and it is claimed by the appellant that a due bill was given by Page

Appellant insists that the claim was assigned by Briggs to the appellee before the lien was made out and filed for record in the office of the register of deeds. The court on consideration of the evidence found otherwise. As we have stated before, the written assignment accompanying the mechanics' lien shows on its face that it was made in April, 1901, at least eight months after the lien was perfected. Bradford testifies that the assignment was actually made at that time, and that when Briggs delivered the mechanics' lien to him in August, 1900, after he had signed and verified it, such delivery was for the purpose of having it filed for record, and that he had it recorded for and on behalf of Briggs. This evidence is not disputed by any one, and we think it was sufficient to justify the trial court in its finding on that question.

It is next contended that the mechanics' lien was not perfected and filed in the office of the register of deeds within four months after the completion of the contract, as required by law. We have carefully examined the evidence on that question. It appears that when Page moved into the house Briggs had not yet completed his contract; that the first story was mostly completed, but the basement was not finished. Briggs testified that after the settlement Page asked him to come out to his house and put the stops on the cellar door. In answer to a question he said:

A. Well, at the time I settled with him I agreed to come up and finish up. Page and I lived neighbor, and every once in a while he would speak about it.

Q. At that time you left the house in November was it agreed then that you should come back and complete the house?

A. I told Mr. Page that I would come back and do that work for him, yes, sir.

Q. When you went back was it in pursuance to that agreement?

A. Yes, sir.

Q. So that the house was not complete in November, at that time this work was not done?

in truth and in fact the building was not completed and that the work done, though slight in amount, was performed under the contract and for the purpose of its completion, the time for perfecting a lien dates from the time such work was done. The question in this case seems to be purely one of fact. The case was tried before the district court on oral evidence. The witnesses being present before the judge, who had an opportunity to see them, to observe their demeanor upon the stand, he was in a much better situation to determine the truth of the matter in controversy than is a court of review. We are unable to say that the finding of the trial court that the lien was perfected within four months after the contract was finally completed is not amply supported by the evidence. This being true we ought not to disturb the findings and judgment of the trial court.

It seems that the case was fairly tried; we find no error in the record, and we recommend that the judgment of the district court be affirmed.

ALBERT, C., concurs.

AFFIRMED.

THE ESTATE OF LEWIS M. BENNETT, DECEASED, v. HARRIET
L. TAYLOR, CLAIMANT.

FILED SEPTEMBER 17, 1903. No. 13,017.

Commissioner's opinion. Department No. 3.

1. **Evidence: ACCOUNT BOOK OF DECEDENT: CHARGES BY HIM: ADMISSIBILITY: PREJUDICE.** The admission in evidence of a book showing an account between a decedent and one who has filed a claim against his estate, is not prejudicial error where all the items which the court allowed the jury to consider are charges made by the decedent against the claimant, even though the foundation for the admission of such book as a book of account has not been properly laid.
2. **Evidence: DECLARATIONS OF DECEDENT: ADMISSIBILITY AGAINST CLAIMANT.** Declarations in his own favor made by a decedent in his will are not admissible in favor of his estate against a party filing a claim against the estate.

thereon. This takes that item out of the case and we need not discuss it.

Assignment No. 2 relates to the admission in evidence of certain books of account kept by the deceased, Lewis M. Bennett, and showing the account between him and the claimant. Except as to one item of \$243, being a credit in favor of the claimant, which entry was made in the handwriting of Mrs. Bennett, also deceased, the entries were all adverse to the claimant and in favor of the estate. As to the credit of \$243 the court instructed the jury that they were not to allow that item in her favor because of a failure of proof. It is evident therefore that the admission of this book of account, if error at all, was error without prejudice.

Assignment No. 3 relates to conversations had in the presence of Mr. Bennett, and we think the evidence was properly admitted. The same may be said in relation to assignment No. 4, which relates to statements in the deposition of a niece and frequent visitor at the house of Mr. Bennett, describing the nature of his disease, the necessity of the constant attendance of a nurse or assistant, and statements made by Mr. Bennett in his lifetime relating to work performed by the claimant.

Assignment No. 5 relates to the refusal of the court to receive in evidence the decedent's bank book. Among the items filed by claimant was a due bill for \$100 dated in August, 1896. Counsel for the estate insists that no interest should be allowed upon this due bill until demand of payment had been made, and he argues that as the bank book offered in evidence showed that decedent had more than \$100 on deposit to his account from the date of the due bill to the time of his death it was evidence tending to show that he could have paid the due bill at any time on demand and that it was the intention of the parties that it should not draw interest. Section 4, chapter 44 of the Compiled Statutes [Annotated Statutes, section 6728], defines the instruments upon which interest should be allowed, and a due bill is one of the instruments coming

The bill of particulars filed in the county court set up: 1st. A claim against the estate of the due bill for \$100 above referred to. 2d. A claim for \$243 for services which claimant asserted had been credited to her account by the entry of the account book made by Mrs. Bennett in her lifetime and which the court took from the jury by an instruction. 3d. The item of \$30.45 entered on the book of account and which was also taken from the jury. 4th. It was stated that the claimant, at the special instance and request of the decedent, rendered services as nurse and housekeeper for said Bennett from the 1st day of January, 1899, to the date of his death on October 20, 1900, being ninety-four weeks; that the services consisted of managing the dwelling-house of the deceased and doing all the work usually incident to the duties of a housekeeper, and in addition thereto, at the special instance and request of the deceased, she rendered services consisting in watching at his bedside both day and night, giving him medicines, baths, rubbing him, and generally performing the duties of a nurse during said period of ninety-four weeks. "That said services as nurse and housekeeper as aforesaid were of the fair and reasonable value of \$15 per week." This last claim to our mind is clearly on a *quantum meruit*. The petition filed by the claimant in the district court, while not in the exact language of the bill of particulars filed in the county court, is not a departure therefrom.

No answer was filed by the estate in the proceedings had in the county court. In the district court the executor filed an answer admitting: 1st. The possession by the claimant of the due bill. 2d. Admitting the payment by the decedent of various sums credited to the estate in the bill of particulars filed by the claimant in the county court, and also set forth in her petition in the district court. 3d. A general denial of all matters in the petition not specifically admitted. The fourth paragraph of the answer is as follows: "That he alleges that from the 17th day of May, 1898, at which time Mrs. Lewis M. Bennett

employment as housekeeper and nurse, and, as an inducement for her to do so, offered to pay her for her services a larger amount than she had theretofore been receiving and to make the compensation satisfactory to her, and further agreed to provide plaintiff with a home for the rest of her life. That she accepted said offer and continued in his employment under the agreement that she was to receive an amount greater than \$4.50 per week for which she had been working for nine years previous thereto. She then recited that during her further employment she continued her duties as housekeeper and the additional duties of nurse to the said Bennett which required her constant attention.

We can not see that the amended reply tended in the least to change the issues in the case. The question was, what were her services as a nurse reasonably worth? If the executor of the estate was surprised by any matter contained in the reply, and was unable on account thereof to proceed with the trial, his remedy was to apply for a continuance. This he did not do, and he can not now urge a reversal of the case by this court upon grounds which he did not present to the district court. *City of Lincoln v. Staley*, 32 Neb., 63; *Nye & Schneider Co. v. Snyder*, 56 Neb., 754.

We have taken time to show the character of the bill of particulars filed in the county court, the petition filed in the district court, the reply and amended reply, for the reason that it is earnestly insisted that while the claim in the county court was on a *quantum meruit* the issue was changed by the pleadings filed in the district court and a trial had upon a contract. We can see no merit in this claim. It is true that by the reply and amended reply it is tacitly admitted that for her work as housekeeper the claimant was to receive \$4.50 per week, but for her additional services as nurse and attendant upon the deceased she was to receive such increased compensation as would be satisfactory to her. As no amount was agreed upon, the allowance of a reasonable amount for such services is

not a matter for complaint. A review of the evidence would serve no useful purpose.

What has already been said will dispose of the objections urged to the instructions of the court except instruction No. 5. A part of that instruction is in the following words: "And should you fail to find for her as explained in instruction No. 4, you would in that event find for her and allow her the sum of \$4.50 per week during the time herein stated." It is said that the word "fail" was an unfortunate one; that it implied that if the jury did not find more than \$4.50 per week to be due claimant they would be lacking in some respect and would in the judgment of the court fall short of doing their whole duty under the evidence. It was admitted by the estate that claimant was to receive the sum of \$4.50 a week in any event. The case was tried upon that theory. The court, the jury, and every one connected with the case, understood that this was the position, and we can not see that an instruction or instructions which assume that as a basis could have misled in any way or have been prejudicial to the estate. The instructions, taken as a whole, were, we think, as favorable as the estate could ask, and we are in grave doubts if the item of \$243 appearing in the account book in the handwriting of Mrs. Bennett, but which account was continued and apparently adopted by Mr. Bennett in his dealings with the claimant, were not improperly taken from the jury.

The judgment in the case awards execution to carry it into effect in the following words: "for all of which execution is hereby awarded." Section 239 of chapter 23 of the Compiled Statutes [Annotated Statutes, section 5104], provides that "The final decision and judgment in cases so appealed shall be certified to the probate court, and proceedings shall be had thereon necessary to carry the judgment of the appellate court into execution." It is possible that by virtue of this statute alone no general execution would be allowed to issue from the district court to enforce the judgment, but the question of the binding force

of the judgment and the manner of its enforcement is not one which a prudent counsel would leave for future determination after the time for an appeal had expired. The court had jurisdiction of the parties and the subject-matter of the action, and grave doubt may exist of the right to question it in any manner except by a direct attack on appeal. We think that the court was in error in awarding execution on its judgment, the only method provided for its enforcement being by certifying it to the probate court as an established claim against the estate, where it is to be paid if the estate is solvent and sufficient, and prorated with other allowed claims if the assets of the estate are not sufficient to pay all allowed claims in full.

The verdict of the jury is fairly supported by the evidence and we recommend an affirmance of the judgment except so far as it awards execution for its enforcement.

KIRKPATRICK and POUND, CC., concur.

The judgment of the district court is in all things affirmed except in so far as it awards execution for the enforcement of said judgment, and as to the award of execution it is reversed.

REVERSED IN PART.

AUGUST SUCKSTORF ET AL. V. WILLIAM H. BUTTERFIELD.

FILED SEPTEMBER 17, 1903. No. 13,019.

Commissioner's opinion. Department No. 1.

1. Replevin: PLEADING: OWNERSHIP: AMENDMENT. Petition and affidavit in replevin which alleges a special ownership in the property replevied, may be amended so as to allege a general ownership in the property.
2. Pleading: AMENDMENT: DISCRETION. The terms on which an amendment to a petition may be permitted rests ordinarily in the sound discretion of the trial court.

ERROR from the district court for Wayne county. Tried below before BOYD, J. *Affirmed.*

from it conveyed the absolute title in the stock to him, or whether he only held them by virtue of his mortgage. The district court permitted this amendment over defendants' objection. The cause proceeded again to trial and plaintiff had judgment, and defendants again bring error to this court.

The only question seriously urged is that the court erred in permitting plaintiff to amend his petition by alleging a general instead of a special ownership, and that the petition on which the cause of action was tried was such a material change of issues as to start the statute running from the time the amended pleading was filed. The gist of an action in replevin is the question of the right of the possession of the property in controversy at the commencement of the suit. While it is necessary that the petition should show whether the plaintiff claims a special or a general ownership in the goods replevied, yet it is uniformly held by this court that a petition and affidavit in replevin may be amended by alleging a special instead of a general ownership in the property, or *vice versa*, and that an amendment when so made relates back to the inception of the cause; the filing of an amendment being but the continuance of the original cause and not the commencement of a new action. *Hudelson v. First National Bank*, 56 Neb., 247, 76 N. W. Rep., 570; *Weich v. Milliken*, 57 Neb., 86, 77 N. W. Rep., 363; *Tackaberry & Co. v. Gilmore & Ruhl*, 57 Neb., 450, 78 N. W. Rep., 32. This view of the case disposes of both the right of the court to permit the amendment and of the contention that the statute of limitation was put in operation by filing the amended petition.

The only other complaint urged is that the court should have prescribed terms before permitting plaintiff to file his amended petition. The record shows that the court said that he would reserve the question of terms until the issues were made and the cause finally disposed of. It also appears that a motion to retax costs in the lower court is pending; consequently, the question of terms on

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which the amendment should be permitted is still an open one in the district court. We might also add that this is a question in any event that rests in the sound discretion of the trial court.

It is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and AMES, CC., concur.

AFFIRMED.

GERHARD MONNICH, APPELLANT, v. JOHANN SCHWARTZ,
APPELLEE.

FILED SEPTEMBER 17, 1903. No. 13,024.

Commissioner's opinion. Department No. 1.

1. **Chattel Mortgages: FORECLOSURE: STATUTORY METHOD: EQUITY: JURISDICTION.** "Notwithstanding the parties to a chattel mortgage have stipulated therein for the foreclosure and sale of the mortgaged property by advertisement in the manner authorized by statute, a court of equity has jurisdiction to entertain an action thereon, and adjudicate the respective rights of the parties in such action. The statutory method of foreclosure is not exclusive. *Meeker v. Waldron*, 62 Neb., 689, 87 N. W. Rep., 539.
2. **Chattel Mortgages: FORECLOSURE: INJUNCTION.** Where an injunction is necessary to a successful foreclosure of a chattel mortgage, it is error to refuse one.
3. **Crops: FORECLOSURE: LIEN IN LEASE: RESIDUE.** In foreclosing a lien granted upon crops by the terms of a lease it is competent for a court of equity to refuse to retain more of the crops than are necessary to discharge the amount due.


APPEAL from the district court for Cuming county.
Tried below before GRAVES, J. *Reversed in part.*

Courtright & Sidner, for appellant.

T. M. Franse, contra.

HASTINGS, C.

Two questions are presented in this appeal. 1st. Had the plaintiff a right to an injunction as an adjunct to fore-



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contract; that he was farming the crop; that he was entirely solvent and that plaintiff had an adequate remedy at law. A motion was made to vacate the temporary injunction, upon which the district judge vacated the injunction as to the crop of 1901, on the ground that plaintiff had an adequate remedy at law, and modified the injunction as to the crop of 1902 so as to permit the defendant to use necessary feed for his stock. At the trial the court, as above indicated, entered a decree foreclosing the chattel mortgage on the remainder of the crop of 1901, but found that the injunction was improper and should stand dissolved; found an equitable lien upon the crop of 1902 and as to 100 acres of corn and wheat, and as to this continued the injunction, but as to the rest of the crop of 1902 the injunction was dissolved.

As above stated, plaintiff appeals and complains of so much of the decree as released the remainder of the crop of 1902 and the discharge of the injunction against the selling of what was left of the crop of 1901. An examination of the evidence does not show that anything was lost to the plaintiff by reason of the court's refusal to hold the remainder of the crop of 1902. If the court retained enough of this crop to discharge plaintiff's lien, we are totally unable to see how equity could require anything more.

The other complaint of the discharge of the injunction as to the crop of 1901 and the dismissal of that portion of the plaintiff's action, and the finding that plaintiff was not entitled to any injunction in the foreclosure of his chattel mortgage, we think can not be sustained.

In *Mecker v. Waldron*, 62 Neb., 689, 87 N. W. Rep., 539, it is held that the fact that a sale of a mortgaged property by advertisement is stipulated for does not deprive a court of equity of jurisdiction to foreclose the mortgage. It is clear, therefore, that the fact that a replevin suit to obtain possession was available to the plaintiff did not oust equity of its jurisdiction to aid plaintiff in enforcing his mortgage if such action was called for under the evidence in this case; the property was mortgaged in the form of a grow-

ing crop; a sale in the open market would divest the plaintiff's lien, and the defendant was selling it, and in fact continued to sell it after the injunction was dissolved. Only a small portion of the property covered by the mortgage remained when the decree was entered.

If, as the Waldron case holds and the weight of authority indicates, plaintiff had a right to abandon the stipulated sale and foreclose in equity, he plainly had a right to an injunction to render that foreclosure effectual.

It is recommended that so much of the finding and decree as denied the plaintiff a right to an injunction against the sale of the mortgaged crop of 1901 be reversed and set aside and the remainder of the decree affirmed.

AMES and OLDHAM, CC., concur.

That much of the finding and decree of the district court as denied the plaintiff a right to an injunction against the sale of the mortgaged crop of 1901 is reversed and set aside and the remainder of the decree is affirmed.

REVERSED IN PART.

S. FRIEDEN v. WILLIAM CONKLING ET AL.

FILED SEPTEMBER 17, 1903. No. 13,025.

Commissioner's opinion. Department No. 2.

1. Judgment: ASSIGNMENTS: EVASION OF EXEMPTIONS. Evidence examined, and held sufficient to show that an assignment of a judgment was not *bona fide*, but was colorable and made for the purpose of evading the exemption laws of this state.
2. Trial: INSTRUCTIONS: SUMMARY OF PLEADINGS. Instruction examined, and held not erroneous.
3. Trial: INSTRUCTIONS: REFUSED TO PARTY, GIVEN BY COURT. It is not error to refuse an instruction tendered, where the ground covered thereby is fully covered by an instruction given by the court on its own motion.

of the judgment by Frieden to Haynes was made for the purpose of evading the exemption laws of this state, nor that it was not made in good faith. Frieden, testifying in his own behalf, disclaimed any intention to evade the exemption laws and insisted on the good faith of the transaction so far as he was concerned. But he recovered the judgment in Douglas county and, in his attempts to enforce it there, discovered that the plaintiff was a married man, the head of a family and a resident of the state of Nebraska, and that his earnings from the Union Pacific Railroad Company were exempt from execution; he also satisfied himself that the judgment could not be collected in this state. Afterward, with the knowledge of these facts, he consulted his codefendant Altschuler, an attorney, in regard to the collection of the judgment. Altschuler told him, in effect, that the defendant Haynes might buy the judgment and Frieden then executed an assignment of the judgment and left it with Altschuler. Afterward suit was brought on the judgment in Council Bluffs in which a writ of attachment was issued and the wages due the plaintiff were seized thereunder. These facts, taken in connection with the other circumstances, which it would take too long to detail, were amply sufficient to warrant the jury in finding that the assignment was merely colorable and made for the purpose of evading the exemption laws of this state. *Bishop v. Middleton*, 43 Neb., 10.

It is next insisted that the court erred in giving the first paragraph of its charge to the jury. That paragraph is merely a summary of the pleadings. It is not claimed that it contains anything not found in the pleadings, that it omits any material matter pleaded, nor that it is unfair in any way. The only complaint urged against it is that "it is erroneous for want of facts to base it on." As it is based on the pleadings and does not purport to state any proposition of law, the complaint is unfounded.

It is next insisted that the court erred in refusing to give instruction number two asked by the defendant, to the effect that to entitle the plaintiff to recover against the

Association Addition to the city of Omaha, Nebraska, upon which he resides, and on which in addition to his residence he had erected two other dwelling-houses which were occupied by tenants. The Omaha Gas Manufacturing Company owned a lot contiguous to and adjoining plaintiff's lot. Prior to the year 1897, the gas company had constructed and was maintaining a gas storage basin diagonally across the street from plaintiff's lot and in the year 1897 began the construction of a gas holder or storage basin on the lot adjoining plaintiff's premises. The gas holder is a large metallic storage basin, about 103 feet in diameter at the base, and is constructed in three sections, each about twenty-five feet in height, so arranged that they slide up and down within each other like the sections of a telescope, and when the structure is fully expanded it stands substantially seventy-five feet in height. When defendant began the erection of this gas holder on the lot adjacent to plaintiff, plaintiff instituted an action in the district court for Douglas county for the purpose of restraining the erection of the structure, alleging that it was being erected in violation of the ordinances of the city and that if erected and used for storing gas there would be danger of explosion, leakage of gas, injury to health, tainting of the air and soil, and injury to the water in the well used by plaintiff and his tenants. A restraining order issued on this petition was subsequently dissolved by the trial court and the erection of the storage basin having progressed to completion, plaintiff amended his petition and alleged that he had been damaged in the sum of \$1,000 by the erection and maintenance of the gas holder, which he charged constituted a continuing nuisance to his adjacent property by making loud noises, emitting poisonous and noxious gases, obstructing his vision, endangering the life and health of his family and tenants, and destroying the rental value of his premises. The gas company answered the amended petition, admitting the erection of the gas holder, but denying that such structure constituted a nuisance. On issues thus joined there was a

tained in the former supplemental petition, that at or about the time of the construction of the tank there was erected and constructed as auxiliary thereto and part of the appliances thereof four large and high blow or smoke stacks, and "that when defendants, as they do day and night, are filling or storing said gas in said tank, and at all times when said defendants are using said blow or smoke stacks, which blow or smoke stacks are near said tank and near plaintiff's said premises, great volumes of noxious and poisonous vapors, gases and flames of smoke, and other deleterious substances are emitted therefrom filling and impregnating the air in and upon plaintiff's said premises, filling the house thereon, and rendering the same untenable." Defendant filed substantially the same answer to this petition that it did to the supplemental petition on which the former judgment was rendered and added a defense of estoppel by the former judgment. On issues thus joined and after the close of the testimony the court directed a verdict for defendant, and plaintiff brings error to this court.

It is a well established rule that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. 1 Herman, Estoppel and Res Judicata, 112. Now the only question to be determined from the record and evidence in this case is as to whether every issue involved in the present controversy might have been adjudicated between these same parties at the hearing on the supplemental petition in the district court for Douglas county in 1897. While the present petition has described in much more forceful and graphic language the annoyance and injury claimed to have been suffered by plaintiff from the erection and maintenance of the tank, yet we can not say that this picturesque description has laid a foundation for any proof that would not have been admissible under the former petition. If anything is added that would charge a different nuisance it is the allegation with reference to the erection of the four smoke stacks as

the effect that "matters that have been *adjudicated* in a former suit will not be considered in a second action." In *Omaha Lithographing, etc., Co. v. Simpson*, 29 Neb., 96, the holding is "That all questions as to the right of the company to erect and maintain the things named [smoke-stack and steam pipe, etc.] were decided in the former action and that unless new facts were presented sufficient to entitle S. to relief, he could recover nothing on his alleged counter-claim." IRVINE, C., in *City of Hastings v. Foxworthy*, 45 Neb., at page 696, in discussing the rule relative to the law of the case on a second appeal, criticises the conclusion, evidently adopted by some courts, that the principle applies to every question involved in the first appeal whether in fact examined or not. The commissioner makes a distinction between a judgment upon the merits and a *venire de novo*, but he is discussing the "law of the case" rather than the rule of *res judicata* in its strict sense. In *Slater v. Skirving*, 51 Neb., 108, the opinion, also by IRVINE, C., lays down the following rule: "There is a difference between the effect of a judgment, as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action upon a different claim or cause of action. In the former case a judgment on the merits constitutes an absolute bar to a subsequent action, not only as to every matter offered and received to sustain or defeat the claim, but as to any other admissible matter which might have been offered for that purpose. But where the second action is upon a different claim or demand, a judgment in the prior action operates as an estoppel only as to those matters in issue upon the determination of which the finding or verdict was rendered."

The foregoing rule is taken from the case of *Cromwell v. County of Sac*, 94 U. S., 351. It is the distinction that must be kept in mind in the consideration of every case, and it is this distinction that makes the decisions of this court, on this question, consistent when at a first glance they may seem inconsistent. For instance, the case of *Morgan v. Mitchell*, 52 Neb., 667, holds in no uncertain terms as follows: "A judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but, to this operation of the judgment, it must appear either upon the face of the record or be shown by extrinsic evidence, that the *precise question* was *raised and determined* in the former suit." This is apparently laid down as a general rule, but the facts in this case show that the second cause of action was not upon the same claim involved in the first. The rule laid down is adopted from the case of *Wilch v. Phelps*, 16 Neb., 515, and in that case also the record does not show the claims to have been identical. Again in the case of *Richardson v. Opelt*, 60 Neb., 180, it is held that "When the pendency of a prior suit is pleaded in abatement, the case must be the same, or it will not be sustained. There must be the same parties or such as represent the same interest; the same rights must be asserted and the same relief prayed for. * * * As a general rule, where the judgment in a prior suit would be a bar to a judgment

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In the second suit brought in the same or another court of concurrent jurisdiction, the plea of other suit pending will be held good." The causes of action in the prior and subsequent suits as set forth in this case were not identical and, besides, the prior suit was pending when the second action was tried, so the principle involved, while akin thereto, would not fall wholly within the rule of *res judicata*. In *Hamilton Nat. Bank v. American Loan & Trust Co.*, 66 Neb., 67, the rule stated in the syllabus is as follows: "In order that a judgment in a prior suit may be a bar to a subsequent action, it must appear either by the record, or by clear and satisfactory evidence, that the identical issue presented by the subsequent suit was involved or adjudicated in the prior suit, and that both actions are between the same parties or their privies." In this case also the cause of action in the second suit was different from the cause of action in the first and the rule is based on the one adopted in the case of *Slater v. Skirving*, *supra*.

This rule may be applied also in the case of *Martin v. Abbott*, 1 Neb. [Unof.], 59. The syllabus in this opinion, however, is as follows: "The rule that a judgment is conclusive upon the parties to it, as to all matters which might have been litigated and decided in the action, is limited in its application to such matters only as might have been used as a defense in that action, and such matters as if now considered would involve an inquiry into the merits of the former judgment." In the case of *Battle Creek Valley Bank v. Collins*, 3 Neb. [Unof.], 38, the causes of action were identical and BARNES, C., lays down this rule: "A judgment in a former suit will be a bar in a second action between the same parties and their privies involving the same subject-matters, as to everything which the record shows was within the scope of the issues litigated in the former action." However, BARNES, C., in the case of *Malone v. Garver*, 3 Neb. [Unof.], 710, cites this rule again in a case where, apparently, the causes of action in the former and subsequent suits are not identical. The rule adopted in the opinion just preceding this note is also consistent with the decision of *Slater v. Skirving*, *supra*.—REPORTER.

THE ARABIAN HORSE COMPANY V. EVA BIVENS.

FILED SEPTEMBER 17, 1903. No. 13,052.

Commissioner's opinion. Department No. 1.

1. Trial: CROSS-EXAMINATION: STRIKING IRRESPONSIVE ANSWER. It is not error to strike out an irresponsible answer given on cross-examination, especially when it has no relation to the issues in the case.
2. Appeal and Error: EVIDENCE SUFFICIENT: PRESUMPTIONS. In a trial to a court, where the finding is based upon sufficient com-

petent proof, it will be presumed that immaterial evidence was disregarded. *Dewey v. Allgire*, 37 Neb., 6.

3. **Costs: PAYMENT: PROOF OF.** The testimony of the witness who paid them is competent proof of a payment of costs.
4. **Evidence: PRODUCTION OF: CONTRACTS.** The particular place where witness put an executed contract after settlement with regard to it is immaterial where all the essential facts as to it and its custody are in evidence and undisputed.
5. **Mortgages: FORECLOSURE: EVIDENCE SUFFICIENT.** Finding of the trial court found to be in accordance with the weight of the evidence.
6. **Pleading: MISTAKE: AMENDMENT: AFTER HEARING: DISCRETION.** Refusal of leave to amend answer after a hearing, and set up mistake in a settlement, an exercise of sound discretion where the evidence, as a whole, did not show any such mistake.

ERROR from the district court for Gage county. Tried below before STULL, J. *Affirmed.*

Rinaker & Bibb and *L. W. Colby*, for plaintiff in error.

Hazlett & Jack, contra.

HASTINGS, C.

This is a foreclosure suit brought here by petition in error. Plaintiff below, Eva Bivens, filed a cross-bill to foreclose a mortgage on real estate near Beatrice, given April 20, 1899, to secure the payment of \$3,600 and interest at 10 per cent. per annum; she admitted payments on the note to the amount of \$555 and claimed \$3,705 as still due with interest at 10 per cent. from February 19, 1901. The note and mortgage were made by John J. Bivens and she alleged that the property was transferred to the Arabian Horse Company subject to her lien. The horse company admitted the execution of the note and mortgage; admitted its own incorporation; admitted the recording of the mortgage and its purchase of the property; alleged the same payments which plaintiff admitted; and claimed an additional one of \$75 on June 20, 1899; denied that Mrs. Bivens was the owner of the note and mortgage and the

tered a decree for the amount of her note and mortgage, less the other payments credited, according to the trial court's computation made at the time which seems not to have been excessive.

The sole issue in this case, as made by the pleadings, is the existence of an usurious agreement and the payment of the \$75. It is sought to reverse the decree of the court on three grounds: errors in permitting the introduction of evidence; errors in the court's finding of fact, and the refusal of the defendant's request for leave to amend answer in accordance with the evidence, as claimed, after the conclusion of the hearing and the submission of the case.

The first error complained of is the striking out of the statement of the witness Colby, made on cross-examination, "the payments were sent by draft by me." The question asked by counsel on cross-examination was as to these payments, "When were they made"? The reply was, "I could not tell you exactly but they were made sometime after I got back from military service; the payments were sent by draft by me." Plaintiff's counsel moved to strike out this latter statement, which was done by the court. There was no error in this action. It was not responsive to the question and counsel was under no obligation to permit it to remain as an answer to his interrogatory. No attempt was made to introduce any evidence of the sending of such drafts in the affirmative proof of the defendant. The only payment in dispute, the \$75 to attorney Smith, was not made by draft.

Complaint is also made of the admission of statements that the witness Colby had failed in the performance of his part of the contract for a reconveyance of this land. It must be admitted that such evidence had nothing to do with the question, either as to the usurious agreement or as to the payment of the \$75, but the case will not be reversed for the admission of immaterial testimony. It was tried to the court and if the conclusion reached is sustained by sufficient competent proof the finding should be sustained. *Dewey v. Allgire*, 37 Neb., 6. The same seems to

It is complained that the findings of the district court as to the two questions in issue, the usury in this contract and the payment of \$75, are not supported. We are entirely unable to draw any such conclusion from our examination of the evidence. The contract was made between plaintiff's husband, Samuel Bivens, J. A. Smith, plaintiff's attorney at the time, J. J. Bivens and L. W. Colby, the president of the company. The only witnesses who testified are plaintiff's husband and the husband's brother on the one side and General Colby on the other. The brothers testify that the amount due upon the reconveyance contract was in dispute; that their attorney, J. A. Smith, figured it to \$3,900; that Samuel Bivens figured it about \$3,800; Mr. Colby himself put it at \$3,600 and after an extended wrangle Mr. Colby's own figures were taken and the mortgage drawn for that amount; Mr. Colby says that his own figures at the time then stated were \$3,450; that the additional \$150 was a bonus for the forbearance; that there were some costs amounting to about \$50 which he was to pay, and that he was to pay J. A. Smith \$75, under an agreement made with Smith of which he supposed the plaintiff's husband was cognizant. This, however, is denied and there is nothing to show it. The contract which was used at the settlement by the parties, and which bears on its back indorsements of the several payments claimed by Mr. Colby, was produced at the trial. A computation of the amount due upon it, according to its terms, allowing the costs, which defendant was to pay and which were \$50 instead of about \$100 as plaintiff claims, shows, under the rule announced in *Davis v. Neligh*, 7 Neb., 78, and affirmed in *Rawlins v. Anheuser-Busch Brewing Co.*, — Neb., —, 94 N. W. Rep., 1001, a little over \$3,600 as due when the note and mortgage in suit were given, allowing the \$300 presently to be mentioned.

Complaint is made that among the findings is one that the debt is due from the Arabian Horse Company, and that there is no allegation charging an assumption of the debt by that company, and no proof to show such assump-

Merrill v. Garver.

the question of usury, to substitute a claim of mistake, which all the facts in evidence failed to indicate was well founded.

It is recommended that the judgment of the trial court be affirmed.

AMES and OLDHAM, CC., concur.

AFFIRMED.

RAY C. MERRILL V. F. R. GARVER.

FILED SEPTEMBER 17, 1903. No. 13,067.

Commissioner's opinion. Department No. 3.

1. **Gaming: WAGERS: CONTRACTS: NOTICE OF REPUDIATION.** It is not necessary that a defendant, who asserts that the contract sued on is a wagering contract and unenforceable as such, give notice to the other party of his intention to repudiate the contract.
2. **Gaming: WAGERS: EVIDENCE OF PURCHASER'S ABILITY TO HANDLE GRAIN.** On an issue whether a contract for the purchase of 20,000 bushels of wheat was a wagering contract, evidence that the alleged purchaser was not a miller or dealer in grain and had no use for or means of handling the grain purported to be purchased, that he was an electrical engineer of small means, and that the alleged seller had reason to know that he had no property or means to enable him to meet the purchase price of such an amount of grain, or any reasonable proportion thereof, is admissible.
3. **Appeal and Error: BRIEFS: STATEMENTS TOO GENERAL.** A general statement in a brief that the court erred in sustaining objections to a certain line of testimony, without indicating where the rulings complained of are to be found in the record, or the nature of the evidence offered, the objections made, and the rulings thereon, is not sufficient to call for any examination of the matter by this court.

ERROR from the district court for Otoe county. Tried below before JESSEN, J. *Affirmed*.

T. F. Von Dorn, for plaintiff in error.

W. H. Pitzer, contra.

Error is assigned upon certain rulings of the court permitting the defendant to testify, over objection, that he was not a grain dealer nor miller, and had no use for or means of handling 20,000 bushels of wheat; that he was a man of small means; and that the agent of the company with whom he dealt had reason to know that he was not able to pay the sum of \$14,000 called for by the contract, nor any reasonable proportion thereof; and that the aggregate of his contracts amounted to about 150,000 bushels. We think this testimony was clearly admissible for the purpose of showing the intention of the parties at the time they entered into the alleged contract. The circumstances disclosed by this evidence were such as to make it clear to any reasonable mind that the defendant was simply gambling upon the price of wheat and was not able to do more than put up the margins required for that purpose. *Rogers & Brother v. Marriott*, 59 Neb., 759.

Some further complaint is made in the brief with reference to various rulings of the trial court as to admission and rejection of evidence; but they are not made in such manner as to apprise us of the specific grounds of complaint. A general statement in a brief that the court erred in sustaining objections to a certain line of testimony without stating where the rulings complained of are to be found in the record or the nature of the evidence offered, the objections made, and the rulings thereon, is not sufficient to call for any examination of the matter by this court. The brief must state specifically what is complained of, the reason and basis of the complaint, and the exact portions of the record material thereto. *Hackney v. Raymond Bros. Clarke Co.*, — Neb., —, 94 N. W. Rep., 822.

We therefore recommend that the judgment be affirmed.

DUFFIE and KIRKPATRICK, CO. concur.

AFFIRMED.

would preclude the necessity of any examination of the others.

The cause of the action was loss of a livery stable insured for \$1,000 in a policy issued by the defendant company to Fox & Estabrook, June 24, 1899. The barn was totally destroyed by fire June 16, 1902. The answer alleged that the facts stated in the plaintiff's petition were not sufficient to constitute a cause of action; admitted its own incorporation; admitted that plaintiffs were the owners of the property when insured; admitted that it was destroyed by fire on June 16, 1902; admitted that notice was given; admitted the denial of all liability on the company's part and refusal to pay, and denied liability.

Defendant alleged that the policy contained a provision that it should become entirely void if the property were sold, transferred or became incumbered by mortgage or trust deed without the written consent of the company indorsed on the policy. It alleged that on February 14, 1901, plaintiff Estabrook sold his one-half interest in the property to Fox, and that the latter on March 5, 1902, conveyed the premises by warranty deed to James H. Forbes and William T. McClain, and afterwards, on March 29, 1902, Forbes and McClain conveyed to Fox; that these transfers were without the knowledge or consent of the company or indorsement of consent upon the policy; that it had no knowledge of the transfers until after the loss, when it declared the policy void and denied liability.

Plaintiff replied by general denial, except as to matters admitted, and then admitted the making of the deed by Estabrook to Fox in February, 1901, but said that Fox was a member of the firm of Fox & Estabrook, one of the plaintiffs; that when the policy was issued the plaintiffs were and for a long time had been partners and still are under the name of Fox & Estabrook; that when the policy was issued the title of the property stood in Daniel Fox and Oscar A. Estabrook jointly; that the property was

cerned, it is undisputed that in March, prior to the fire, the title of Forbes and McClain, whatever it was, was reconveyed to Fox and was in Fox at the time the fire occurred. This would seem to render unimportant any question relating to the deed of Fox to Forbes and McClain. Where the title may have been during the term of the policy would be unimportant if prior to the loss it had been reconveyed to the parties for whom it was originally insured, or to one properly holding it under the terms of the policy. *Home Fire Ins. Co. v. Johansen*, 59 Neb., at page 352; *State Ins. Co. v. Schreck*, 27 Neb., 527; *Omaha Fire Ins. Co. v. Dierks & White*, 43 Neb., 473; *Johansen v. Home Fire Ins. Co.*, 54 Neb., 548. It is true that all of the above cases relate to conveyances by mortgage, but we do not see why the same doctrine is not applicable to an absolute deed, and it was so applied in *Power, Tutrix, &c. v. Ocean Ins. Co.*, 19 La., 28, and *Lane v. Maine Mutual Fire Ins. Co.*, 12 Me., at page 47.

This being the situation, it becomes unnecessary to consider the state of the evidence as to the delivery of the deed made to Forbes and McClain. As to the effect to be given to the deed from Estabrook to Fox, this court is committed to the proposition that a sale made by a partner of partnership property to his partner is not a conveyance within the terms of this forfeiture clause. *Phenix Ins. Co. v. Holcombe*, 57 Neb., 622. It is true that the holding in that case was with regard to personal property, and counsel for the company claim that it can have no application to real estate and that in any event there is no claim in the petition that this is partnership property. They, however, cite no case holding the distinction between transfers of personalty and those of real property such as they seek to make. None is indicated in the cases which we have examined, and it seems unimportant, also, whether the property is held in partnership or merely in cotenancy. A transfer between the assured owners is not held to be a violation of the policy, the entire property being insured to each of them. The reply in this case

Jessen v. Donahue.

JOHANN H. JESSEN V. CARRIE DONAHUE.

FILED SEPTEMBER 17, 1903. No. 13,083.

Commissioner's opinion. Department No. 2.

1. **Bastardy:** EVIDENCE SUFFICIENT. Evidence examined, and *held* sufficient to sustain the verdict.
2. **Evidence Conclusive:** SUBMISSION OF FACT TO JURY. Where a material fact is conclusively established by the evidence, it is not error to omit or refuse to submit such fact to the jury.
3. **Trial:** INSTRUCTIONS: RECALL OF JURY: DISCRETION. It is not error for the trial court on its own motion to recall the jury and give additional instructions, after they have retired for deliberation.
4. **Bastardy:** INSTRUCTIONS APPROVED. Instructions examined, and *held* not erroneous.

ERROR from the district court for Buffalo county.
Tried below before SULLIVAN, J. *Affirmed.*

George W. Fox and Edward A. Cook, for plaintiff in error.

H. M. Sinclair, contra.

ALBERT, C.

This is a proceeding in bastardy wherein Johann H. Jessen is charged with the paternity of an illegitimate child. A trial in the district court resulted in a verdict of guilty and a judgment for the support of the child. The defendant brings error.

The main contention of the defendant is that the verdict is not sustained by sufficient evidence. It would serve no useful purpose to set out the testimony. As usual in cases of this kind, there is no direct testimony, save that given by the respective parties. The testimony of the complaint is clear and positive that the defendant is the father of the child; that of the defendant is equally clear and positive that he is not. The testimony of each

the witness has in the result of the suit; his or her demeanor upon the stand; the apparent intelligence or want of intelligence of the witness; the opportunity or want of opportunity of the witnesses for knowing the facts concerning which they testify; the probability or improbability of the facts related by the witnesses, and their apparent candor and fairness or want of such where witnesses directly contradict each other.

"You should consider all the testimony in the case and, after considering it all and the surrounding circumstances appearing on the trial, determine which of the witnesses are the most worthy of credit and give credit accordingly."

One objection urged against the foregoing instruction is the use of the word "effect" in connection with the word "weight." The defendant insists that the words do not mean the same thing, and that, used together, they had a tendency to confuse the jury. We are unable to concur in that view. The two words, as used in the instruction, mean precisely the same thing, and either of them expresses the idea the learned judge sought to convey to the jury. The use of both, to convey the same idea, was no doubt to make the meaning more clear and the language of the instruction more forcible.

Another objection, urged against this instruction, is based on the clause, "where witnesses directly contradict each other." The defendant contends that, by the use of such clause, the jury were liable to infer that the instruction applied only to the testimony of such witnesses whose testimony was contradicted. We do not think it probable that the jury drew any such inference; but assuming that they did, and that the court intended that they should, it does not follow that the instruction is erroneous. The matters which the court instructed that the jury should take into account in weighing the testimony, are matters which they undoubtedly should take into account where the testimony is that of witnesses who contradict each other. Consequently, it would not be improper for them

wrong no juror should hold out through a spirit of stubbornness. Neither should a juror permit the friendship or admiration, the ill feeling or prejudice, he may entertain for any counsel connected with the case to influence him.

"Considerable time has been consumed in the trial of this case. It is not probable that further evidence can be furnished another jury in the trial of the case if you are finally discharged because you can not agree and the case is again tried. You are probably in as favorable a position to decide the case as another jury can be. I want you to realize that it is your work and your duty to decide this case, and to decide it correctly. I hope you will, on retiring to your room, do so, each with the honest conscientious desire to agree and to return a verdict which is justified by the evidence and the law, and which will meet the approbation of your own conscience."

In regard to the foregoing instruction, the defendant first contends that the court had no authority to instruct the jury after they had retired, except upon the request of the jury as provided by section 287, Code of Civil Procedure. Such is not the rule. This court has held that the recalling of the jury for further instructions is so far within the discretion of the trial court as not, of itself, to present a subject for review. *McClary v. Stull*, 44 Neb., 175. Thompson, in his work on Trials, volume 2, section 2363, says that it is the privilege of the presiding judge to recall the jury and give them additional instructions, until, in his opinion, he has fully possessed their minds of the law of the case.

Another objection, urged against the last instruction, is that it had a tendency to cause some of the jurors to abandon their personal opinions and convictions and to force a verdict. We do not think the instruction is open to that objection. It is a well-known fact that, after a prolonged controversy, pride of opinion is apt to blind the eyes to the truth. The instruction under consideration was well calculated to impress upon the jury, that they

OLDHAM, C.

This is a mandamus proceeding instituted on the relation of Clark F. Ansley, a professor in the University of Nebraska, during the school year of 1898 and 1899, to compel the board of regents to issue a certificate for the balance of salary earned by him as an instructor in the institution during this year. The petition alleges that the salary of his position had been fixed at the sum of \$1,500 per annum; that all services for the year had been rendered, and that defendants had issued him certificates to the amount of \$1,250, and no more. There was a trial in the court below; judgment for the relator, and defendants bring error to this court. No motion for a new trial was filed in the court below and, consequently, the only question before us for review is the sufficiency of plaintiff's petition to sustain the judgment.


In addition to the things above set out the petition alleged that at the time of its filing there was and still is a fund in the state treasury, appropriated by the legislature, to pay salaries of the university professors, the amount of which exceeds plaintiff's claim, against which said claim is a just and lawful charge.

It is urged by plaintiffs in error that this allegation is too indefinite in that it fails to describe the funds or when they were appropriated. We think this allegation is clearly sufficient after judgment. And again, it is doubtful whether or not this allegation is essential in the proceedings against the board of regents, since section 25, chapter 87, Compiled Statutes [Annotated Statutes, section 11220] provides that disbursements from the university funds shall be made by the state treasurer upon warrants drawn by the auditor, who shall issue warrants upon certificates issued by the board of regents, signed by the president and secretary. While this allegation would undoubtedly be essential in an action against the auditor if he had refused to draw the warrant on a certificate presented, duly signed by the president and secretary of the

Von Forel v. State.

board of regents, we are not fully convinced that it would be essential in an action to compel the officers of the board to issue the certificate for services rendered. But in any event we think the allegation sufficient against an attack made for the first time in this court.

It is further urged that the relator had an adequate remedy at law by suit for damages against the board and, consequently, that mandamus will not lie. This contention is based on the theory that the state university is an educational corporation and not properly speaking a state institution. But this contention flies in the face of a long line of decisions of this court, beginning with *Regents v. McConnell*, 5 Neb., at page 428, and ending with *State v. Moore*, 46 Neb., at page 379, in which we held that the university is a mere state institution, and the board of regents a state agent. In the latter case it was specifically held that the state university is a state institution, and that the funds of the university were not merely intrusted to the state treasurer as custodian for the university, but were covered into the treasury and became a part of the state's funds intrusted to him in his official capacity as state treasurer. Section 5, chapter 87, *supra*, makes it the duty of the board of regents to fix the salaries of the professors and instructors in that institution, and section 25 makes it the duty of the regents to certify claims against the institution to the auditor. It is a well established principle that county and city boards and the auditor of public accounts of the state act ministerially in allowing claims for salaries fixed by law, and that when they refuse to act mandamus will lie to compel action. It was urged in the oral argument by plaintiffs in error that this case is controlled by the recent decision in *State v. Mortensen*, — Neb., —, 95 N. W. Rep., 831, which held that mandamus will not lie against state officers to compel the specific performance of contracts. This is as far as the decision goes. In the case at bar mandamus was invoked, not to compel the specific performance of a contract, but to require the issuance of a certificate for services rendered under a compensation fixed by law.



Swift v. Boyle.

It is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and AMES, CC., concur.

AFFIRMED.

MARY B. SWIFT, APPELLEE, v. MRS. BIRDIE BOYLE ET AL.,
APPELLANTS.

FILED SEPTEMBER 17, 1903. No. 13,120.

Commissioner's opinion. Department No. 1.

Mortgages: APPRAISAL DEFECTIVE.

APPEAL from the district court for Douglas county.
Tried below before DICKINSON, J. *Reversed.*

James L. Boyle, per se, and E. F. Morearty, for appellants.

V. O. Strickler, contra.

AMES, C.

This is an appeal from an order of confirmation of a judicial sale of real estate. There are two grounds of exception assigned. First, that the property was appraised and that it sold too low. There is no allegation of fraud. Second, that one of the appraisers was not a freeholder of the county. There is no evidence tending to support this assignment, except that an attorney for the appellants made affidavit that he had carefully examined the records of the county and was unable to ascertain therefrom that one of the appraisers was a freeholder, and that, in fact, he was not a freeholder. We think this evidence alone and un rebutted is sufficient for the purpose intended.

It is recommended that the judgment of the district court be reversed and the sale set aside.

HASTINGS and OLDHAM, CC., concur.

REVERSED AND SALE SET ASIDE.

defendant sets up that plaintiff, through his agents, foreclosed without notice to or knowledge of the defendant and, while in possession under such foreclosure, sold a house upon the land, which was removed by the purchaser. He pleads also that plaintiff's agent entered into an agreement with defendant whereby the latter was to convey the land in consideration of \$25 and surrender of the papers and that, in pursuance of such agreement, he executed a deed which plaintiff's agent caused to be recorded. Trial was had to the court, which found for the defendant. Proceedings in error are brought by the executors of the plaintiff, who died pending suit.

The answer is very carelessly drawn, and a great deal is left to inference or intendment, without any specific allegation. As its sufficiency was challenged at every stage in the lower court, we have some doubt whether in its present form it will sustain a judgment. But the defenses which the pleader was evidently endeavoring to state are, in our judgment, maintainable. In an action to recover a deficiency after foreclosure of a mortgage, the mortgagor may set up, by way of counter-claim, damages sustained by reason of waste committed by the mortgagee in possession. *Smith v. Fife*, 2 Neb., 10. Possibly it would be better to say that the mortgagor might treat the sale of the house severed from the freehold as a conversion, and, waving the tort, maintain a set-off in *quasi-contract* to recover the value. Wherever one might waive a tort and sue in *assumpsit* at common law, he may maintain a set-off under the Code against any claim arising out of contract. Several cases which really involve set-off have been spoken of as cases of counter-claim, as for instance, *Sheibley v. Dixon County*, 61 Neb., 409. But the question is not material in this case. A trust deed executed by way of security is, in effect, a mortgage, and foreclosure thereof out of court by sale under the power therein contained conveys no title. *Comstock v. Michael*, 17 Neb., 288. Hence, where a mortgagee in possession under such a sale disposes of buildings upon the property and permits them

Staunchfield v. Jeutter.

to be removed by the purchasers, he becomes liable for waste. It is true in this case the property was in an adjoining state, but there is no evidence as to the laws of that state and, in the absence of proof to the contrary, we must presume that the laws of that state are the same as our own. *Schmitt & Brother Co. v. Mahoney*, 60 Neb., 20; *Welton v. Atkinson*, 55 Neb., 674. We do not think, however, that a judgment for the defendant can be supported on this defense alone. The plaintiff credits \$200 as the proceeds of trustee's sale. If the defendant insists the sale was invalid the plaintiff, as purchaser at the sale, is not to be charged with that sum. The damages which the evidence will fairly show upon the defendant's counterclaim are not at all sufficient to wipe out the whole amount of the note and interest.

As to the other defense, as the reply is a general denial, an essential part of defendant's case was to show the contents of the deed he claims to have made to plaintiff, under his agreement with plaintiff's alleged agent. He attempted to prove this by testimony that he had examined the records of the county in which the land lay, where he found it recorded, and that he knew its contents, at least as to the point in question, only from inspection of such record. He was then permitted to state who were the grantees, as shown by the record. This evidence, which was objected to, was clearly incompetent, and will not support the findings and judgment. The record of a deed may be shown without inquiry as to the original whenever the evidence as a whole fairly indicates that the original is not in the possession or under the control of the party offering such proof. *Delaney v. Errickson*, 10 Neb., 492, 501; *Rupert v. Penner*, 35 Neb., 587. But in such case, the record is made primary evidence by the express provisions of section 13, chapter 73, Compiled Statutes [Annotated Statutes, section 10213], and hence the rule that there are no degrees of secondary evidence does not apply. Unless properly acknowledged substantially in accordance with the statute, the deed would not

be entitled to record, nor the record admissible in evidence. *Maricell v. Higgins*, 38 Neb., 671. The evidence received in the case at bar does not even purport to show that the record claimed to have been examined would have been competent. As the cause was tried to the court, there is, of course, a presumption that this evidence was not considered. But if we leave it out of account, the defendant's case is without support in a material respect.

We recommend that the judgment be reversed and the cause remanded for a new trial.

DUFFIE and KIRKPATRICK, CC., concur.

REVERSED AND REMANDED.

MARY A. HUTCHINSON, APPELLEE, v. MARGARETHA SMIDT
ET AL., APPELLANTS.

FILED SEPTEMBER 17, 1903. No. 13,138.

Commissioner's opinion. Department No. 1.

1. **Mortgages: FORECLOSURE: DESCRIPTION: OBJECTION AFTER SALE: PREJUDICE.** "On proceedings to affirm a sale of mortgaged premises, no objection will be heard founded on an erroneous or imperfect description of the premises in any of the proceedings, unless it be alleged and shown that the party objecting will be prejudiced thereby, nor in cases of personal service or appearance of such party in the action, and such erroneous or imperfect description occurs in proceedings before judgment." *Cooper v. Foss*, 15 Neb., 515.
2. **Mortgages: FORECLOSURE: CONFIRMATION: OBJECTIONS: JURISDICTION AT CHAMBERS.** Jurisdiction to confirm a sale carries with it jurisdiction to overrule objections to it.

APPEAL from the district court for Douglas county.
Tried below before DICKINSON, J. *Affirmed.*

George A. Magney, for appellants.

Crane & Boucher and *Daniel Horrigan*, contra.

**SAMUEL GORDON, APPELLEE, v. ANNIE M. STEWART ET AL.,
APPELLANTS.**

FILED SEPTEMBER 17, 1903. No. 13,142.

Commissioner's opinion. Department No. 2.

- 1. Homestead: HUSBAND AND WIFE: SECOND MARRIAGE VOID: EFFECT: DESCENT AND DISTRIBUTION.** One S., having children, not minors, and an insane wife, at all times residents of England, owned a dwelling house and lived therein with a woman with whom he had entered into a void marriage contract. After the death of S., his children and true widow claimed the property by descent as having been the homestead of S. That it was his homestead, doubted, but not determined.
- 2. Mortgages: LIEN PAID BY STRANGER: HUSBAND AND WIFE: SECOND MARRIAGE VOID: SUBROGATION.** The property was incumbered by a valid mortgage lien; plaintiff loaned S. money with which the lien was paid off and, in good faith, took a mortgage on the property executed by S. and the woman with whom he was living, as husband and wife. *Held*, That plaintiff has a lien on the property for the money loaned and so used, either by virtue of his mortgage or that by subrogation, he has such lien by virtue of the lien so paid. *Held further*, That plaintiff was not a mere volunteer, and that claimants may not avoid his mortgage, and retain the benefit of the release of the prior valid lien.

APPEAL from the district court for Lancaster county.
Tried below before FROST, J. Affirmed.

John L. Sundean and Frederick Shepherd, for appellants.

F. L. Sumpter and Mockett & Polk, contra.

GLANVILLE, C.


The plaintiff, Samuel Gordon, commenced this action in the district court for Lancaster county to foreclose a mortgage made by Robert R. Stewart, now deceased, and Annie M. Stewart, defendant, as husband and wife, for the sum of \$300 covering property at that time occupied by the mortgagors. The action was commenced against Annie M. Stewart, individually and as administratrix,

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and afterwards the appellants, Martha Stewart, Margaret Stewart and Margaret J. Harm, intervened, and P. J. Elmen was substituted as administrator of the estate of Robert R. Stewart, who died intestate while still living on the property. Margaret Stewart is alleged and admitted to have been the wife of the deceased Robert R. Stewart, and Martha Stewart and Margaret J. Harm are his daughters by the said Margaret Stewart.

It appears from the pleadings and evidence that the deceased, Robert R. Stewart, left England in 1881, leaving behind him the above named daughters and his wife, then and ever since insane and incarcerated as insane in an asylum there; that he became a resident of this state soon after and kept up a correspondence with his daughters for some time; that he acquired the property in question in the city of Lincoln and incumbered the same with a valid mortgage before he commenced to occupy it in any manner, and afterwards commenced to live on the property with the defendant Annie M. Stewart, as husband and wife under the guise of a void marriage; that thereafter, the plaintiff was induced to lend money with which to pay off the prior mortgage, taking the mortgage in question to secure its repayment; that the money advanced by the plaintiff was actually paid upon the prior lien and the release thereof received and turned over to the deceased by the plaintiff; that the deceased, Robert R. Stewart, and the defendant Annie M. Stewart, by the recitals of said mortgage, represented themselves to be husband and wife, and that the defendant Annie M. Stewart, as well as plaintiff, believed in the existence of such relation.

The district court found for the plaintiff, and entered a decree of foreclosure. The above named interveners, and the administrator, seem to have appealed. The brief of appellants is signed by the attorneys only, without showing for whom they appear, but the interveners and administrator seem to have given the supersedeas bond, and we take it the brief is for them.



Appellants contend that because the deceased lived on the property and was married when the plaintiff's mortgage was made, the mortgage is void under section 4 of our homestead act [chapter 36, Compiled Statutes; Annotated Statutes, section 6203], and say in their brief, "Appellants make two points: first, the appellee was not entitled to subrogation; second, the court erred in adjudging that the premises in controversy were not the homestead of Robert Stewart."

The appellee contends that the occupancy of the property by the mortgagors, living together in violation of law, could not make it the homestead of the deceased mortgagor; that the presumption that the home of the husband is the home of the legal wife is rebutted by the evidence; and that if it be true that the mortgage given to him is a nullity, he is entitled to the lien of the mortgage his money paid off, by subrogation.

It goes without saying, that a court of equity will scrutinize the record very carefully and minutely and examine a wide range of the law before it will admit itself powerless to prevent the inequity attempted by the appellants. The court feels no sympathy for a daughter that will reach out seven thousand miles to shake the plaintiff's lien from this property which his money had relieved from a pre-existing valid lien, by proving that her father died an unprosecuted felon, so that she may inherit his property free from the lien. If the court can not reach natural justice without doing violence to the principles of law governing its action, it will adhere to these principles and say, "The law allows it, and the court awards it," but we do not think equity will disappoint justice in this case.

There is no room for contention between the plaintiff and the interveners about the fact of the prior marriage, because of the admission in the pleadings, and the determination of the case must turn upon the interpretation to be given the statute and the enforcement of the principles of equity applicable to the facts.

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ter the estate by removing a valid lien, he surely must be protected to the extent of giving him a lien or interest in the estate as it stands, or else by reviving the old lien for his use by subrogation.

In *Hill, Trustees*, 144, it is said: "Wherever the circumstances of a transaction are such that the person who takes the legal estate in property can not also enjoy the beneficial interest, without necessarily violating some established principle of equity, the court will immediately raise a constructive trust, and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties who, in equity, are entitled to the beneficial enjoyment."

In *Bohn Sash & Door Co. v. Case*, 42 Neb., 281, the question of the right of a mortgagee to be subrogated to the rights of the holders of prior mortgages paid by the consideration of his mortgage is discussed at some length, and while the court held in that case that the right of subrogation was not shown, yet the discussion of the question is instructive. The trial court in that case had allowed subrogation as against the holders of several mechanics' liens on the ground that the evidence showed that the holders of these liens were virtually chargeable with fraud in conjunction with the mortgagor to deceive the mortgagee and to induce him to believe in the non-existence of their liens prior to the time of their being filed. The evidence in this regard was examined and held not to justify such finding, and therefore subrogation against the appellants was denied by this court.

It will be noticed that these parties who resisted the right of subrogation were parties who did not claim under the mortgagor by title, or interest thereafter acquired, and were not therefore in privity with the mortgagor as to his right, title and interest in the property as held by him at the time the mortgage was made. In the case before us, the interveners can stand in no better plight than the deceased, Robert R. Stewart, as their claim of title is through him by inheritance.

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(Minn.), 31, is an example. Because in this case there are concisely stated the conditions necessary to entitle to subrogation of the nature just mentioned, the following language is quoted: "The better opinion now is that one who loans his money upon real estate security for the express purpose of taking up and discharging liens or incumbrances on the same property has thus paid the debt at the instance, request, and solicitation of the debtor, expecting and believing, in good faith, that his security will of record be substituted, in fact in place of that which he discharges, is neither a volunteer, stranger, nor intermeddler, nor is the debt, lien, or incumbrance regarded as extinguished, if justice requires that it should be kept alive for the benefit of the person advancing the money, who thereby becomes the creditor."

The case of *Betts v. Sims*, cited in the foregoing opinion, was where Betts and wife were attempting to quiet title to their homestead against the defendant, who claimed through a deed to the premises, void because made only by the husband. While holding under such deed, the defendant had mortgaged the premises, and with the proceeds paid off valid mortgages existing at the date of the deed, and it was held that the defendant should be subrogated to the rights of the several mortgagees, and that he was entitled to a decree of foreclosure in the action brought to quiet plaintiff's title.

Ayres v. Probasco, 14 Kan., 175, was where the homestead was selected from the property of the wife, foreclosure proceedings had been had, and to save the property by satisfying the decree, a new loan was made, but the mortgage attempted to be given to secure the same was found to be void. It is held in the syllabus: "And the mortgage being void as to the wife and being on property owned by her and occupied by herself and husband as a homestead, the mortgage is also void as to both husband and wife."

It was also held in that case that a party who receives an involuntary benefit is not estopped from denying the

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and we think this claim must be sustained to the extent of the amount due on the \$600 mortgage, and the taxes paid out of the money advanced to the executors by the plaintiff. The grounds for that relief rest upon principles of natural justice and equity, which are amply vindicated in the decisions above cited, especially in the exhaustive opinion of Mr. Justice Lyon in *Blodgett v. Hitt* [29 Wis., 169]. The plaintiff loaned his money to the executors to pay off the \$600 mortgage and taxes, which were incumbrances upon the property, and confessedly liens prior in right and superior in equity to any lien that Martin acquired under his mortgages of 1873-4. This \$600 mortgage was given by the testator and wife to Martin in 1869, was past due, and Martin wanted his money. The plaintiff loaned his money at the solicitation of the executors, to take it up and relieve the estate. It is true, the plaintiff took from the executors at the time the \$800 mortgage in suit, relying upon the validity of the license of the probate court of Racine county authorizing and directing the executors to execute that mortgage for the purpose of procuring this loan. But it is conceded that this license is defective and does not bind the heirs; consequently the security upon which the plaintiff relied has practically failed. Still his money has been applied to the discharge of just debts against the estate, and he has the prior right to be reimbursed out of the estate to the extent of the incumbrances which he has removed.

"It is objected that in furnishing the money to discharge these incumbrances he was a mere volunteer, in whose behalf there can be no subrogation. But the plaintiff loaned his money at the request of the executors, relying upon the validity of the mortgage which they had been ordered by the probate court to execute, and is not to be treated as a volunteer in the legal sense of that term. The case of *Blodgett v. Hitt* is decisive upon that point. See also *Payne v. Hathaway*, 3 Vt., 212."

The court held: "That plaintiff, as security for his advances, is entitled to be subrogated to M.'s rights as mort-

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gagee, under such first mortgage; and this not only against the heirs, but also as against M.'s subsequent mortgages."

The case of *Jones v. Parker*, 51 Wis., 218, was a case where a mortgagee released a valid existing mortgage on the premises involved, taking a new mortgage for the debt, and it appears that the new mortgage was void as to the homestead estate and dower right of the wife, although the prior mortgage was valid as against such rights, and it was held, "That equity will treat said substituted mortgage as continuing to the plaintiff all the rights he had under the original mortgage as to homestead and dower."

In *The Home Savings Bank v. Bierstadt*, 168 Ill., 618, 61 Am. St. Rep., 146, it is said by Phillips, C. J.: "Subrogation, as a principle of equity jurisprudence, is generally confined to the relation of principal and surety and guarantors, or to a case where a person is compelled to remove a superior title to that held by him in order to protect his own, and also to cases of insurers. The general principle of subrogation is confined and limited to these classes of cases: *Bishop v. O'Connor*, 69 Ill., 431; *Borders v. Hodges*, 154 Ill., 498. Whilst these general heads include the doctrine and principles of subrogation, that doctrine has been steadily expanding and growing in importance and extent in its application to various subjects and classes of persons. This equitable principle is enforced solely for the accomplishment of substantial justice, where one has an equity to invoke which can not injure an innocent person. The right of subrogation which springs from the mere fact of the payment of a debt, and which is included under the heads first above stated, is what is termed legal subrogation, and exists only where included within those classes. But, in addition to this principle of legal subrogation, there exists another principle, which is termed conventional subrogation, which results from an equitable right springing from an express agreement with the debtor, by which one advances money to pay a claim for the security of which there exists a lien, by which agreement he is to have an equal lien to that paid off, whereupon he

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is entitled to the benefit of the security which he has satisfied with the expectation of receiving an equal lien: *Coe v. The New Jersey M. R. Co.*, 31 N. J. Eq., 105; *Tyrrell v. Ward*, 102 Ill., 29; *Tradesmen's Building Association v. Thompson*, 32 N. J. Eq., 133."

Wilton v. Mayberry, 75 Wis., 191, 17 Am. St. Rep., 193, is a case where the plaintiff, as the court found, "in mere friendship, without any selfish interest whatever," loaned money with which to pay off a valid existing mortgage on the premises, and which was actually so paid, and the mortgage discharged of record, under an agreement that the mortgagors and owners of the property would execute to him a new mortgage for the amount so advanced, plaintiff in confidence paid the money and caused the prior mortgage to be released, whereupon the owners, instead of giving such new mortgage, deeded the land, with intent to defraud the plaintiff, to the defendant John R. Mayberry, who had full knowledge of the loan and the agreement under which it was made. The plaintiff brought his action, setting up the facts and praying to be subrogated in the place of the mortgagee of the prior valid mortgage. The defendants demurred generally, and stood upon the demurrer. It was contended that the petition showed that the plaintiff was a mere volunteer and had no interest in the land to protect and could not be subrogated as prayed. The court, distinguishing the case from cases where subrogation is sought merely because the money borrowed was paid in extinguishing a lien without any understanding or agreement or expectation that the creditor should have an equal lien on the property, held that the plaintiff was not a volunteer and was entitled to subrogation as prayed.

The following recent decisions all sustain the right of subrogation under circumstances which render them on principle authority in the present case, and several of them are directly in point. *Texas Land & Loan Co. v. Blalock*, 76 Tex., 85, 13 S. W. Rep., 12; *Southern Building & Loan Association v. Page*, 46 W. Va., 302; *Faulk v.*

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ance Co. v. Middleport, 124 U. S., 534, as sustaining the propositions, "(1) That the person seeking its benefit must have paid a debt due to a third party, before he can be subrogated to that party's rights; and (2) that in doing this he must not act as a mere volunteer, but on compulsion, to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt, as in cases of sureties, prior mortgages, etc. The right is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another." That case was where the plaintiff had purchased void bonds issued by the city of Middleport, and claimed the benefits of subrogation to the rights of the holders of a debt, due from the city, supposed to have been paid by the bonds. The plaintiff bought the bonds as they stood in the market as a matter of speculation or investment merely; it had no dealings with the city, had paid no money to the city, and had paid no debt of the city; the parties to whom the city owed the debt were still the owners of the claim, and the plaintiff was held not entitled to subrogation. We think the case is not in point and is not in conflict with the cases herein cited, holding that a person standing in the position of the plaintiff Gordon is not a mere volunteer.

The case of *Watson v. Wilcox*, 39 Wis., 643, also cited by RAGAN, C., is distinguished by the Wisconsin cases herein cited.

The courts of Michigan, long since the case of *Kitchell v. Mudgett*, 37 Mich., 81, cited, have adopted the principle of subrogation urged in favor of the plaintiff and the case of *Fort Dodge Building & Loan Association v. Scott*, 53 N. W. Rep. [Ia.], 283 is quoted from, on page 284, as follows: "It was well understood that the plaintiff was to accept a new mortgage, and plaintiff got all he bargained for. There was no mistake, except that the plaintiff failed to exercise the diligence required in the examination of the records, and therefore failed to discover the existence of the judgment and the sale thereunder. No one can be

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ing of the statute. *Lane v. Philips*, 69 Tex., 241, was where a man and woman were living upon the property as husband and wife, but in fact were not such, and in the opinion we find the following language: "It is very clear that a family, such as is contemplated by the constitution and laws exempting the homestead from forced sale, can not be made up with constituents consisting only of a man and woman living together, as were the appellant and the woman with whom he lived. * * * To constitute a family, within the meaning of the law giving the homestead exemption, the persons who dwell together must not in the fact of so doing be violators of the law of the land." A similar holding is found in *Bell v. Keach*, 80 Ky., at page 44.

In the Texas case, the claimant was allowed his homestead because of minor children, recognized as his, though in fact illegitimate. *Whitlock v. Gosson*, 35 Neb., 829, was where the husband of an insane wife remaining in the state of Illinois, lived with his children on the land in question. This was held to create a homestead, and that a mortgage made by the husband alone was void. If the property involved in this action became the homestead of the deceased Stewart as claimant, because of the facts existing in relation thereto, then the plaintiff's mortgage is void, otherwise it is good, but in either case he has a lien that equity will enforce.

We think, moreover, that the evidence and pleadings sufficiently establish that the whole of the money loaned by plaintiff was applied to the payment of the former mortgage; and as no contention is made that the amount awarded by the decree is wrong that his lien is for the full amount represented thereby and that the decree of the district court should stand as entered.

We therefore recommend that the judgment of the district court be affirmed.

BARNES and ALBERT, CC., concur.

AFFIRMED.

State v. Baxter.

THE STATE OF NEBRASKA, EX REL. JOSEPH L. BAKER, RELATOR, V. IRVING F. BAXTER, JUDGE OF THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF NEBRASKA, RESPONDENT.

FILED SEPTEMBER 17, 1903. No. 13,362.

Commissioner's opinion. Department No. 3.

1. Pledges: FORECLOSURE: JUDGMENT, PERSONAL: SUPERSEDEAS AS TO FORECLOSURE. Where a decree awards the plaintiff a personal judgment against the defendants and also directs the sale of pledged property by way of foreclosure, the defendants may supersede that portion of the decree providing for foreclosure of the pledge without superseding the money judgment.
2. Pledges: FORECLOSURE: SUPERSEDEAS: DISCRETION AS TO AMOUNT AND CONDITIONS. In such case, it is in the discretion of the district court to fix the amount and conditions of a bond to be given in order to supersede the decree of foreclosure.
3. Pledges: FORECLOSURE: SUPERSEDEAS: FAILURE TO FIX CONDITIONS: PRACTICE. If the district court fails to fix the conditions of the bond, application should be made for a further order, and there is no supersedeas until the terms of the bond are determined by the court and the required bond is given.
4. Pledges: FORECLOSURE: SUPERSEDEAS: FAILURE TO FIX CONDITIONS: PREJUDICE WHEN BOND GIVEN APPROVED. But in case bond is given in the amount fixed and upon reasonable conditions, and the district court, upon motion to direct an order of sale, approves the bond given, this is, in effect, equivalent to an order fixing the conditions as stated in such bond, and the irregularity is not prejudicial.

APPLICATION for writ of mandamus. *Writ denied.*

Brome & Burnett, for relator.

Hall & McCullough, contra.

POUND, C.

The application for a writ of mandamus shows that relator obtained a decree in his favor, in a suit pending in the district court, by which he was awarded a personal judgment against certain defendants and also an order of

sale of certain pledged property by way of foreclosure. There was a provision in the decree directing that "supersedeas bond for an appeal to the supreme court herein be and is fixed at \$500." No order was made as to the conditions of the bond. The defendants executed and filed a bond, in the sum designated in the decree, conditioned that if the defendants hold the relator "harmless by reason of any depreciation in the stock ordered to be sold by said decree, and shall pay the costs of appeal if the judgment be affirmed, then this obligation shall be null and void, otherwise to remain in full force and effect." Afterwards relator applied to the clerk for an order of sale, and, on refusal, moved the court to direct that such order issue for the reason that there was no sufficient supersedeas. The court declined to do so, and relator now seeks to compel such action by mandamus. The respondent demurs.

As the decree awards relator a money judgment for nearly \$13,000, which clearly comes within the purview of subdivision 1 of section 677, Code of Civil Procedure, we have no doubt that the order of the court and the bond are of no effect so far as that portion of the decree is concerned. Relator may have execution notwithstanding. But the remainder of the decree is not governed by said section 677. If it stood alone, the district court, in its discretion, would be authorized to allow a supersedeas upon such terms as to amount and conditions of the bond, as it might fix. *Penn Mutual Life Ins. Co. v. Creighton Theatre Building Co.*, 51 Neb., 659; *Home Fire Ins. Co. v. Dutcher*, 48 Neb., 755. Can it matter that the decree of foreclosure is part of a decree which awards a money judgment also? We think not. In substance and effect there are two decrees, one for the recovery of money and one for foreclosure of a pledge. To dispose of the whole controversy in one suit and thus do complete justice to the plaintiff, both are rendered in one proceeding and as parts of one decree. The reason of the proceeding does not require, and justice to the defendants forbids, that this circumstance be held to compel superseding of the money

WILLIAM B. SMITH ET AL. V. THE COUNTY OF CLAY IN THE
STATE OF NEBRASKA.

FILED OCTOBER 7, 1903. No. 12,569.

Commissioner's opinion. Department No. 2.

Counties: SALARY OF CLERK: FEES. *Mitchell v. Clay County*, 96 N. W. Rep., 673, followed.

ERROR from the district court for Clay county. Tried below before STUBBS, J. *Reversed*.

S. W. Christy, for plaintiffs in error.

Ambrose C. Epperson, contra. .

POUND, C.

This case was submitted with *Mitchell v. Clay county*, — Neb. —, 96 N. W. Rep., 673, and turns upon substantially the same questions. For the reasons stated in the latter case, we recommend that the judgment be reversed and the cause remanded.

BARNES and OLDFHAM, CC., concur in recommending judgment of reversal.

The judgment of the district court is reversed and the cause remanded for further proceedings according to law, in accordance with the decision in *Mitchell v. Clay County*, 96 N. W. Rep., 673.

REVERSED AND REMANDED.

NOTE. The opinion cited in the case reported above was, on rehearing, reversed and the final opinion is reported in 98 N. W. Rep., 662. April 21 1904. The case reported above was, on rehearing, also reversed and *Mitchell v. Clay County*, 98 N. W. Rep., 662, cited to sustain the reversal. The rehearing opinion in *Smith v. County of Clay*, reported above which was delivered by the court, may be found in 99 N. W. Rep., 501. Both opinions will be reported in the official state reports.—
REPORTER.

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upwards and purporting to have been issued by the Cudahy Packing Company to two of its employees. Several days afterwards and after Gillispie had learned of the forgery, Coleson again visited the saloon and was accused by the former with being in confederacy with the stranger and threatened by him with prosecution unless he should disclose the name and identity of his supposed accomplice. After some hesitation and apparent attempt at evasion Coleson, under the stress of such importunity, gave to Gillispie the name of the defendant in error, Charles Stafford, as that of the party guilty of the transaction. Stafford was a young man, then and for a considerable time previously employed by one Rushford, a respectable tradesman in said city and of good reputation and innocent. Gillispie at once and without making further inquiry repaired to the office of the police judge and prosecuting attorney of the city, and after relating to them the foregoing circumstances, was advised by the attorney to verify and file a complaint for the arrest of Stafford upon the charge of forgery, which he immediately did and the accused was apprehended and thrown into jail on the same evening. Coleson had told Gillispie that Stafford was employed by Rushford whose place of business was not far distant from the saloon. Gillispie saw the accused at the jail on the evening of the arrest, but on account of darkness and of the fact that the features of the latter were obscured by coal dust, he was unable to satisfy himself as to his identity with the forger without the assistance of Coleson who was not present and whom he was unable to find. At nine o'clock on the following morning Stafford was released upon bail and at his request the case was continued until the 3d of January and afterwards until the 9th of that month. On the latter date at the police court all three of the parties met for the first time, and Gillispie and Coleson agreed that the accused was not the guilty party and united in requesting a dismissal of the prosecution which was accordingly done. This action was then begun by Stafford against Gillispie

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time, and such facts as he could have obtained by the use of ordinary care and diligence to the said Henry C. Murphy, Esq., an attorney at law, then such consultation with the said Murphy and in acting upon the advice given him by said Murphy upon the representations so made to him by the defendant, would be no excuse for the prosecution of the plaintiff, and would be no defense to this action."

The specific objection made to this instruction is to the following phrase therein: "and such facts as he could have obtained by the use of ordinary care and diligence." There are cases in our reports which seemingly approve the law as announced in this instruction, while other cases apparently approve a different rule.

In *Turner v. O'Brien*, 5 Neb., 542, Justice Gantt, at page 546, in speaking of the rule allowing the advice of an attorney to be urged on behalf of the defendant, observed: "And for the reasons stated above, the testimony of the defendant, in respect to taking the advice of an attorney in relation to the matter, previous to the commencement of the prosecution, was also properly admitted.

"But to repel the imputation of malice or establish probable cause, by such evidence, it must appear in proof, that the opinion of counsel was fairly asked upon the real facts, and not upon statements which conceal the truth or misrepresent the cause of action. If the law were otherwise, nothing would be more easy than to shelter the most malicious prosecution under the opinion of counsel, honestly given, but under a total mistake of the facts.' He must not withhold any fact or information from his counsel, but on the contrary, he must fairly, fully and honestly, inform his counsel of all the facts and information known to himself, and then he must pursue the course pointed out by his legal adviser."

It will be seen that there is no intimation in the language used that the defendant must not only inform his counsel of all facts within his knowledge but also such as he could have ascertained "by the use of ordinary care and diligence."

cause to institute the prosecution. It is urged against this rule that by its enforcement one commencing a criminal prosecution with the most malicious motives and entire want of probable cause might shield himself behind the advice of an unscrupulous or incompetent attorney. In reply to this it may be said that dishonest parties often take advantage of the most beneficent legal rules in an attempt to escape punishment or damage on account of their wrong doing, and the fact that injustice may occasionally arise because of a rule of law founded on reason and public policy ought not to operate in its disfavor. Public policy and the enforcement of our criminal laws require that where probable cause exists to believe one guilty of a criminal offense a prosecution therefor should be instituted; and no citizen commencing such a prosecution with honest motives and from a desire to enforce the laws of the land, should be made liable in damage because of an honest mistake, or the development of facts in the case of which he was not aware at the time of instituting the action. We also think that the attorney who may be consulted in such a case is required to go further in his opinion than to give his judgment upon the facts disclosed to him, and that his advice covers his belief as to whether sufficient inquiry has been made by the defendant to ascertain other facts which further investigation might disclose. In other words: the advice of a reputable attorney that probable cause exists to believe the defendant guilty of the crime charged, includes his judgment not only upon the facts known to the defendant at the time and disclosed to him, but also that the defendant has exercised such diligence in inquiry and investigation as to make a *prima facie* case and warrant the belief that further inquiry was not necessary and would develop nothing to rebut what was already known. Advice of counsel is sought to ascertain whether a criminal action should be commenced against the suspected party and the client's inquiry in legal effect is this: On the investigation made and the facts discovered should I commence a criminal

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If Mr. Murphy had been told that Stafford was named as the man who passed the check but that such information was obtained from Coleson under a threat of arrest and prosecution as being accessory to the crime, it is hardly probable that he would have advised the arrest without further inquiry, upon the mere statement of one whom the circumstances indicated as an accomplice, and who was threatened with prosecution in case he did not point out and name the party with whom he acted in the perpetration of the crime. The natural and reasonable inference under such circumstances is that Coleson would name some one in order to avoid the immediate threatened arrest, and if guilty as an accomplice in the crime it is not at all probable that he would name the real party who was associated with him in its perpetration.

We recommend the affirmance of the judgment of the district court.

ALBERT, C., concurs.

AFFIRMED.

JOHN E. HANSON, APPELLANT, v. HANS E. HANSON,
APPELLEE.

FILED OCTOBER 7, 1903. No. 12,741.

Commissioner's opinion. Department No. 3.

1. **Partition: MORTGAGE BY TENANT: LIEN ON INTEREST OF COTENANT.**
In an action for partition, in which it appears that the legal or record title is, and has been, in one of the tenants in common and that he has encumbered the property for his own benefit and advantage, it is error to charge the incumbrance as a lien upon the aliquot interest of his cotenant.
2. **Partition: TENANCY IN COMMON: ACCOUNTING: PARTNERSHIP.** When in an action for partition, it appears that the parties in interest are not tenants in common, merely, but are partners in the land, it is proper, upon an accounting, to charge either party with the value of his individual use and occupation of the premises.
3. **Partition: TENANCY IN COMMON: IMPROVEMENTS: REIMBURSEMENT: INTEREST.** A tenant in common who discharges incumbrances or makes lasting and valuable improvements upon the property under

circumstances entitling him to reimbursement, is entitled to interest upon moneys expended in so doing.

4. **Partition: ACCOUNTING: DUTY OF TRIAL COURT TO STATE ACCOUNT CONCISELY.** When an action in partition involves an accounting of transactions between the parties extending over a long series of years it is the duty of the trial court, by himself or a referee, to state the account giving the items or classes of items and sums credited and charged to the respective parties and the facts in his opinion affording a reason therefor, so that this court may form a judgment as to whether the conclusion reached is justified by the law and the evidence.
5. **Partition: TRANSACTIONS NOT ENDED: LIMITATION OF ACTIONS.** The transactions between the parties with respect to the land in question having extended over a long term of years and appearing not yet to have ended, the statute of limitations is not pleadable.

ERROR from the district court for Wayne county.
Tried below before **BOYD, J.** *Reversed.*

Ira D. Marston, for appellant.

A. A. Welch, contra.

"A tenant in common who has had sole possession of land, but has received no rent therefor from third persons, in the absence of any agreement to pay rent, is not liable for the use and occupation of the land to a cotenant who has never demanded possession." *Belknap v. Belknap*, 41 N. W. Rep. [Ia.], 568; *Kean v. Connelly*, 25 Minn., 222; *Hause v. Hause*, 29 Minn., 252, 13 N. W. Rep., 43; *Varnum v. Leek*, 23 N. W. Rep. [Ia.], 151; *Everts v. Beach*, 31 Mich., 136, 18 Am. Rep., 169; 11 Am. & Eng. Ency. Law [1st ed.], 1099; *La Barron v. Babcock*, 122 N. Y., 153; *Peck v. Carpenter*, 7 Gray [Mass.], 283; *Bolton v. Hamilton*, 2 W. & S. [Pa.], 294; *Hamby v. Wall*, 48 Ark., 135; 3 Am. St. Rep., 218; *Keisel v. Earnest*, 21 Pa. St., 90; *Ward v. Ward's Heirs*, 40 W. Va., 611, 52 Am. St. Rep., at page 930; 17 Am. & Eng. Ency. Law [2d ed.], 690, and cited cases.

Action in the form of an equity suit, will not lie by tenant in common against cotenant, in sole possession

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of the premises, to recover a share of the profits resulting from the labor and money of the defendant, when the plaintiff has expended neither, and has never claimed possession, and has never been liable for contribution in case of loss. *Pico v. Columbet*, 12 Cal., 414, 73 Am. Dec., 550; *Israel v. Israel*, 30 Md., 120, 96 Am. Dec., 571; *Crane v. Waggoner*, 27 Ind., 52, 89 Am. Dec., 493.

The Nebraska cases are not in conflict with the foregoing authorities. See *Mills v. Miller*, 3 Neb., 87; *Lynch v. Lynch*, 18 Neb., 586; *Oliver v. Lansing*, 50 Neb., 828; *Names v. Names*, 48 Neb., 701.

If defendant is held liable for the rental value of the premises, no interest can be allowed, for no demand therefor was made. *Names v. Names*, 48 Neb., 701, 709; *West v. Weyer*, 46 Ohio St., 66.

Rents and profits received by one cotenant constitute merely a personal charge against him, and give to the other cotenant no lien on the property or interest of his cotenant. *Newbold v. Smart*, 67 Ala., 326; *Clark v. Hershy*, 52 Ark., 473; *Brittinum v. Jones*, 56 Ark., 624; *Bird v. Bird*, 15 Fla., 424, 21 Am. Rep., 296; *Burch v. Burch*, 82 Ky., 622.

AMES, O.

For more than twenty years last past the plaintiff and defendant have been the owners in joint tenancy or tenancy in common, each of one-half of a tract of land in Wayne county. This is a statutory action for a partition with which are united under the authority of *Mills v. Miller*, 3 Neb., 87, mutual demands for an accounting for moneys expended, for purchase money, improvements and taxes, and of rentals received and of the value of use and occupation during the times the parties have respectively occupied the premises and parts of them. Referees were appointed pursuant to the statute, who reported that the lands could not be divided without great prejudice to the owners, and their report was confirmed by the court with-

bated before us, is whether the parties should be charged with the value of the use and occupation of the premises during the time of the exclusive occupancy by them respectively. The defendant contends that such a charge ought not to be made because of the general rule that one joint tenant or tenant in common, is entitled to enjoy the use of the estate, unless he wrongfully excludes his cotenant from a like enjoyment, and can be compelled to account to the latter only for such rentals or revenues therefrom as he has received from third persons.

To what extent, if any, this rule is in force in this state we do not feel called upon to decide because it sufficiently appears from the pleadings and evidence in the case at bar, that the interests of the parties in the premises in controversy are not those of tenants in common, merely, but rather to be regarded as those of partners and the principles of accounting applicable to the latter relation should, therefore, be employed in this instance. We are disposed to think, however, that *Mills v. Miller, supra*, and subsequent decisions have committed this court to the doctrine that, in most cases of tenancy in common, the value of exclusive use and occupation is to be accounted for upon final settlement and the balance ascertained thereupon is to be charged as a lien upon the estate in the lands of the party adjudged to be indebted for the same. *Lynch v. Lynch*, 18 Neb., 586. It is true that in *Oliver v. Lansing*, 50 Neb., 828, the validity of this doctrine is questioned upon the ground that individual occupancy of one tenant in common is not necessarily evidence of a denial of common occupancy by his cotenant, but it appears to us that this distinction is more metaphysical than real. There may be situations in which common occupancy if requested, would be permissible, but we opine that, in most instances, under modern conditions of society and business, it would be difficult to so adjust affairs that two bodies could occupy the same place at the same time. Nor can we see any equitable reason why, under circumstances like those in this case, when one

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in keeping with the proprieties of judicial procedure to refer the matter for an ascertainment of the facts and a settlement of the respective credits and debits, and for the court, upon the coming in of the report, to decide upon the correctness of the principles which have been employed and affirm or correct the conclusions of the referee as the occasion may demand. At all events this court ought not to be expected to serve in the capacity of a commissioner in chancery. If the trial court sees fit to assume these functions, which it is entirely proper for him to do, it is incumbent upon him to do what would have been required of a commissioner, namely, find and state the facts according to which, in his opinion, the parties are to be justly charged or credited with particular items or classes of items and sums upon the account, and state the account, and this court can then say, as in other cases, whether or not, in its opinion, the judgment is justified by the findings or whether the findings themselves are invalidated by the law or the evidence, and may, if it sees fit, revise or restate the account as the evidence and the law may seem to it to require.

It is recommended that the judgment of the district court be reversed and the case remanded for further proceedings according to law.

DUFFIE and ALBERT, CC., concur.

REVERSED AND REMANDED.

POUND, C., concurring.

I concur fully in the opinion of my brother AMES. But it seems proper, in order to prevent misconception, to notice the contention that the case should be tried *de novo* in this court upon the record before us. As a general rule, it is the settled practice of this court to enter a new judgment, or to direct a new judgment in the district court, when a judgment of that court in an action in equity is reversed on appeal. But an exception to that practice is no less well settled in cases in

tion might require, although the district court had made no finding upon an issue deemed by this court to be controlling. This was held in *Sanely v. Crapenhof*, 1 Neb. [Unof.], 8, 95 N. W. Rep., 352. The statute was not intended to confer any new power upon this court nor to require it to adopt any new or different procedure with respect to the judgment to be entered on appeal. It was intended to meet a course of decision which had sprung up of recent years, in which the court had announced that findings of fact upon conflicting evidence would not be reviewed, and that, whenever there was any evidence in support of a finding of fact, such finding would be affirmed on appeal, the court doing no more than to ascertain that it had some support in the record. Where no findings have been made, the case does not come within the mischief sought to be reached by the statute and is not within the scope of the language used. Hence it becomes a question for this court, in the exercise of its discretion, to determine whether the ends of justice will be subserved best by a final judgment upon the evidence before it in the record or by remanding the cause for findings upon fuller and more detailed evidence on a further and more satisfactory trial. In the record in the case at bar, there is much to suggest that counsel misapprehended the legal principles involved and that on another trial there would be further evidence material to the accounting which is not before us. As pointed out in *Faulkner v. Sims*, *supra*, the court which sees and hears the witnesses is much better able to reach a satisfactory conclusion than one which has before it only a written record of their testimony. The principles of law having been settled, it is not unlikely that a determination of the issues of fact involved in the accounting upon a further trial would be satisfactory to both parties, and that the cause would not again come to this court. Should it come here once more, if the statute requires us to pass upon the issues of fact or some of them *de novo*, nevertheless it does not require us to do so without the assistance of full and detailed findings of

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son Hartson. The contract sought to be enforced is alleged to have been made between the plaintiff and Hartson. The plaintiff's testimony, and that of his witnesses, in regard to the transaction, if true, clearly establishes that prior to the signing of the alleged contract, and in the negotiations leading up thereto, the defendant Hartson told the plaintiff that the title to the land was in the name of the defendant George M. Smith but that Smith did not have a dollar in the land, that he had put the title in Smith under circumstances and for purposes that clearly establish the transfer as a voluntary and fraudulent conveyance of the property to Smith in trust for Hartson. If this be true, Hartson had no interest in the land that he could enforce in any court of law or equity; neither had he any interest that he could convey to the plaintiff (a mere volunteer with full knowledge of the fraudulent character of the alleged trust under which he claimed the defendant Smith held the title) and thus empower the plaintiff to enforce the trust.

The plaintiff still insists that the evidence establishes the above stated condition of fact and that the same entitles him to the relief sought. It requires neither argument nor citation to make the statement that he can not prevail under such circumstances, and because of the above facts, satisfactory to this court and the bar of the state.

There is another reason why the plaintiff can not prevail while basing his right upon the alleged written contract between him and Hartson. The evidence entirely fails to show that the contract or writing was ever delivered to the plaintiff; it never came into his possession; was signed in the presence of, and left with, a Mr. Bright of O'Neill, and the plaintiff expressly and particularly insists and swears that Bright was never his agent for any purpose, or in any manner, but that he was the agent of Hartson.

It is reasonably certain from the wording of the contract and the evidence produced, that other things were

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torily shown, and it must also appear that such acts were done with reference to, and in pursuance of, the contract.

"Continued possession by a tenant is not such a part performance of a verbal contract for the purchase of land as to take the case out of the statute of frauds. Possession, to have such an effect, must be clearly shown to refer to, and result from, the contract and not the lease.

"The above rule, *held* to apply when the alleged vendee was occupying the land as a former owner."

This proposition is too thoroughly well settled by adjudications in this and other states, to need further citation in support thereof.

The plaintiff can not then prevail in this action because of any such verbal contract if made.

The bill of exceptions in this case is very voluminous and no good purpose would be subserved by a detailed review of the evidence. We will say, however, that it appears that the defendant Hartson, who had at one time been wealthy, had lost nearly all of his property; that he was getting old; that he had at one time been in an insane asylum; and from his examination on the witness stand, we are satisfied that his mind was somewhat shattered, and that the plaintiff is not entitled to a reversal of the case because of anything strange or inconsistent in the testimony of the defendant Hartson; and that Hartson's evidence does not help plaintiff make his case.

We are satisfied that the findings and judgment of the trial court are right, and upon an examination of the plaintiff's evidence alone, would have felt compelled to make the same decision. The plaintiff has failed to prove a case justifying a judgment in his favor.

AFFIRMED.

an agreement made between the administratrix and those claiming under the contract of the decedent it was attempted to change said contract so that the east instead of the north twenty acres of the forty-acre tract was to be conveyed by the estate, the west ten acres of the north twenty being retained by the estate and sold for its benefit. A sum of money exceeding \$350, paid by the administratrix on a contract made by the decedent in his lifetime, was returned to her by those claiming the benefit of the decedent's contract to convey in consideration of her agreement to convey the east twenty acres of the tract. The heir has had the benefit of this money and of the west ten acres above referred to and should not be given the ten acres wrongfully included in the decree of the district court until he offers to do equity by refunding the amount of such benefit.

APPEAL from the district court for Lancaster county. Tried below before FROST, J. *Reversed upon conditions.*

A. G. Greenlee and Field & Andrews, for appellant.

George W. Holmes was not named as a party to the suit in the district court for Lancaster county in 1892. To make an infant a party to a suit, he must be named as a party, and served with notice. It is not sufficient to make his guardian a party. *Tucker v. Bean*, 65 Me., 352; *Story*, Equity Pleading [10th ed.], section 70, note; 10 Am. & Eng. Ency. Law [1st ed.], 686, 687, 689; *Hughes v. Housel*, 33 Neb., 703; *Sprague v. Haines*, 4 S. W. Rep. [Tex.], 371; *Freeman*, Void Judicial Sales [4th ed.], section 17.

Judgment without jurisdiction in strict compliance with the statute as to minors, is void, even if a guardian *ad litem* be appointed. *Freeman*, Void Judicial Sales [4th ed.], section 16; *Clark v. Thompson*, 47 Ill., 25.

A notice directed to the minor, unless the suit was pending against him at the time, would not give the court jurisdiction over him. *Freeman*, Judgments [4th ed.], section 126; *South Bend Chilled Plow Co. v. Manahan*, 62 Mich., 143. Appearance by a general guardian is void. *Gibson v. Chouteau*, 39 Mo., 536.

The filing of an answer by a guardian *ad litem*, when the infant has not been served, is not an appearance by the infant. *Ingersoll v. Mangam*, 84 N. Y., 622; *Helms v. Chadbourne*, 45 Wis., 60; *Brown v. Downing*, 20 Atl.

133, 34 Atl. Rep., 286; *Dawkins v. Dawkins*, 104 N. Car., 301.

E. E. Brown, also *contra*.

That George W. Holmes was a party defendant in the action to sell the real estate is shown both by the proceedings and the decree itself. The service then can only be regarded as irregular and the decree can not be attacked collaterally.

Infants are bound by proceedings to sell real estate, though they are not nominally made parties to the proceedings. *Gibson v. Roll*, 27 Ill., 88; Black, Judgments [2d ed.], section 194.

The plaintiff herein has nowhere shown or attempted to show that he has a defense against the cause of action set out in the petition, upon which the decree now sought to be set aside was rendered, at least no conscionable defense. Black, Judgments [2d ed.], section 193; *Pilger v. Torrence*, 42 Neb., 903; *Hughes v. Housel*, 33 Neb., 703; *Manfull v. Graham*, 55 Neb., 645; *Bankers Life Ins. Co. v. Robbins*, 53 Neb., 44; Freeman, Judgments [4th ed.], section 513.

DUFFIE, C.

In the year 1890 F. F. Roose and others organized a corporation known as the "Normal University Building Association." Its object was to erect buildings and maintain a school near the city of Lincoln to be known as "The Lincoln Normal University." These buildings were to be erected on the southeast quarter of section 32, township 10, range 7 east, in Lancaster county, Nebraska. W. W. Holmes, who owned 160 acres of land, being the northeast quarter of said section 32, appears to have been greatly interested in the enterprise, subscribed for seven thousand shares of the capital stock thereof, and, together with other owners of real estate in that vicinity, contracted to convey to the corporation by way of donation when the buildings were erected twenty acres of land

Holmes v. Columbia Nat. Bank.

ate a Normal University where the Lincoln Normal University is now located, and in order to bring about such location, maintenance and locating, it is necessary to do the following things:

"1st. To erect a building which shall cost, including heating apparatus, not less than \$75,000.

"2d. To equip said building at an estimated cost of \$10,000.

"3d. To erect an electric light plant to cost not less than \$2,500.

"4th. To erect a power house to cost not less than \$1,000.

"5th. To erect a dining hall at an estimated cost of \$10,000.

"We propose to J. H. McClay and E. R. Sizer, if they will erect said buildings, including heating apparatus, equip the same, erect said electric plant and power house as above provided, and if F. F. Roose will erect said dining hall,

"Now, therefore, in consideration of one dollar, the receipt whereof is hereby acknowledged, and the further consideration that said J. H. McClay and E. R. Sizer shall do the things as above set forth, and the said Roose shall erect said dining hall, as above provided, and provided further that said Normal University shall be opened on or before September 6, 1892, by said Roose, and provided further that said university shall be maintained and operated by said Roose, his heirs or assigns, for a period of ten years from September 6, 1892, and provided further that said McClay and Sizer, their heirs or assigns, shall own and hold the campus and said buildings, equipment, electric light plant and power house, until the expiration of said ten years, when said property shall become the property of said Roose, his heirs or assigns; provided said university shall have been operated as aforesaid; I hereby agree to and with said J. H. McClay and E. R. Sizer, and their heirs and assigns, to convey to them or their assigns, by general warranty deed, free and clear of all incum-

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by said Roose of the things herein to be done and performed by him.

"This contract is executed by me in duplicate and is binding on my heirs, executors, administrators and assigns.

"Witness my hand this 29th day of January, 1892.

"EMMA H. HOLMES.

"J. H. MOCKETT.

"Attest:

"W. H. STUBBLEFIELD.

"February 12, 1892. Above proposition accepted,

"SIZER & McCLAY."

It will be noticed that the twenty acres described in this agreement to be conveyed to McClay and Sizer is the east half of the forty-acre tract out of which W. W. Holmes agreed to donate the north twenty acres. In this connection it might be noted that W. W. Holmes, after his contract to donate twenty acres to the university association, entered into a contract with J. H. Mockett by which he agreed to sell and convey to Mockett an undivided one-fourth interest in all the lands owned by him in the northeast quarter of said section 32, except the twenty acres donated to the university, and we presume it was because of his interest in the south ten acres of the land obtained under this contract that Mockett joined in the proposition to McClay and Sizer. McClay and Sizer completed the buildings in the manner prescribed in the Holmes-Mockett proposition and had them ready for occupancy about September 1, 1892, and a school was conducted in said buildings until their destruction by fire sometime in December, 1898. After the completion of the buildings McClay and Sizer called upon Mrs. Holmes for a deed of the twenty acres described in her proposition and as she was willing to convey but unable to do so without an order of the proper court, proceedings were instituted in the district court of Lancaster county for the purpose of obtaining a decree authorizing her to convey said land. The petition in that case is entitled as follows: "Emma H. Holmes,

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appointment as administratrix, paid \$350 on said stock subscription which, together with interest thereon, was refunded to her by Sizer and McClay and of which the estate of W. W. Holmes and the plaintiff have had the benefit; that prior to his death W. W. Holmes had joined in the execution of a note with other parties to the Bank of Crete for the sum of \$3,000; that Sizer and McClay had paid this note under their agreement with Mrs. Holmes, of which plaintiff and the estate of which he is the sole heir has had the benefit, and that Holmes's subscription for \$7,000 of the capital stock of the university has been released to the benefit and advantage of the estate, and that the plaintiff has not tendered or offered to refund to the defendants the amount so paid and has no standing in a court of equity to demand the relief which he is seeking. They also make their answer a cross-petition and demand equitable relief if the court should find against their title to the land in controversy. Upon the hearing a decree was entered dismissing the plaintiff's petition and he has taken an appeal to this court.

The action brought by Mrs. Holmes as administratrix was intended undoubtedly to comply with section 335a of chapter 23 of the Compiled Statutes of 1901 [Annotated Statutes, section 5185]. That statute, among other things, provides: "And the heirs at law, devisees or other legal representatives of the deceased vendor, when not plaintiffs, must be made defendants in the action." That George W. Holmes was an heir of the estate of W. W. Holmes is not in controversy, and that he was not made a party to that action is apparent from the record. As to him, we think the court had no jurisdiction to enter a decree which could in any wise affect his interest. It is true that a guardian *ad litem* was appointed for him by the court but the great weight of authority is to the effect that infant defendants must be properly served with process and that until this is done the court has no jurisdiction over them and the appointment of a guardian *ad litem* is absolutely void. [See cases referred to in 10

service which the court before whom the case was pending examined and held sufficient and that under these circumstances the judgment entered in the case is not void however defective or irregular the service may be.

No one will dispute that such is the law if service was in fact attempted on George W. Holmes, and many cases might be cited in support of the rule contended for and which is aptly stated by Judge Dillon in *Isaacs & Ash v. Price*, 2 Dill. [U. S.], 347, as follows:

"A distinction is to be made between a case where there is no service whatever, and one which is simply defective or irregular. In the first case the court acquires no jurisdiction and its judgment is void; in the other case if the court to which the process is returnable adjudges the service to be sufficient and renders judgment therein, such judgment is not void, but only subject to be set aside by the court which gave it, upon seasonable and proper application, or reversed upon appeal."

The same principle was approved by this court in *Gandy v. Jolly, Swan, Dew & Hardin*, 35 Neb., 711; but the facts here shown do not bring this case within the principle of the rule above stated, the reason being that there was no service of any kind attempted on George W. Holmes, the minor, or such at least is the presumption which must obtain. Where the record in a case fails to show on whom the summons or notice was served, no presumption can obtain that it was served on any except such as were made parties defendant to the action, or, more properly stated, the presumption is that none but parties made defendants in the case were served.

It is said that the finding of the court that "due and legal notice of the pendency of the petition and the proceedings herein have been given to all parties interested herein and in said estate" overcomes this presumption. We can not agree that such is the case. If the recital in the decree was specific and stated as a fact that George W. Holmes had been served with the notice, we concede that only by the most direct and positive proof could the fact

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the estate and the plaintiff as sole heir of the estate has had the benefit of its value. In this condition of affairs he has come to this court asking it to quiet title to land possessed by the defendants and which was taken either knowingly or through mistake in lieu thereof. It further appears to our entire satisfaction that \$350 were paid by the Normal University Association upon the stock subscription of W. W. Holmes by the administratrix of his estate and that Sizer and McClay have returned this amount, together with interest thereon and of which presumably the estate got the benefit. One of the best known of equity maxims is that "he who seeks equity must do equity," and the books are full of reported cases in which the courts have enforced the rule. It is true that the defendants in this case can not have the affirmative relief prayed in their cross-bill for the reason that the statute of limitations which binds a court of equity as well as a court of law has put it beyond the power of the court to give them any affirmative relief in the way of ordering a conveyance by the plaintiff of the ten acres last above described, if he still owns the same or a return of the money paid by McClay and Sizer to the administratrix of the estate by way of return of stock subscription paid. But, as is well stated by Pomeroy in his Equity Jurisprudence, section 386:

The maxim referred to "requires the plaintiff to do 'equity.' According to its true meaning, therefore, the terms imposed upon the plaintiff, as the condition of his obtaining relief, must consist of the awarding or securing to the defendant something to which he is justly entitled by the principles and doctrines of equity, although not perhaps by those of the common law—something over which he has a distinctively equitable right. In many cases, this right or relief thus secured to or obtained by the defendant, under the operation of the rule, might be recovered by him, if he as plaintiff, the parties being reversed, had instituted a suit in equity for that purpose. But this is not indispensable, nor is it even always pos-

and for which these other lands were attempted to be exchanged.

Relating to the note of \$3,000 due the Crete National Bank signed by Mrs. Holmes and others, which McClay and Sizer claim to have paid and discharged under their agreement with Mrs. Holmes of date February 2, 1891, the evidence is very unsatisfactory. It may be and it is probably the most reasonable theory arising from the facts in evidence, that W. W. Holmes in his lifetime signed with others a note for that amount to the Crete National Bank and that this note was renewed after his death, Mrs. Holmes signing it in place of her deceased husband. The evidence is not, however, sufficiently plain and direct to either require or authorize us to hold that such was the case. The books of the Crete National Bank would certainly show the origin of the note, by whom originally signed, and any renewals thereof up to the date of its payment, and it was the duty of the defendants if they desired to establish the liability of the Holmes estate for the amount of the note or any portion thereof to have produced to the court evidence of a satisfactory character of the real facts in the case. Neither do we think that McClay and Sizer can claim anything from their agreement to release Mrs. Holmes and the Holmes estate from liability for the stock subscription of seven thousand dollars.

Their own testimony shows that in carrying out the work which the association had abandoned they were not acting as a corporation and never contemplated issuing stock to any of those who had subscribed for stock in the Normal association. They certainly could not claim anything for themselves from the stock subscription made by Holmes without delivering the stock subscribed for. It is probably true that Holmes or his estate after his death, would be liable on his stock subscription to creditors of the corporation, if any there were, after its assets were exhausted, but no such conditions are shown by the evidence.

We hold, therefore, under the facts established, that the plaintiff, before he can have the relief prayed in his

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ALIENATION. See HOMESTEAD, 2.

AMENDMENTS. See PLEADING, 1, 2, 7, 8. REPLEVIN, 6.

ANIMALS. See REPLEVIN, 2.

Damage By: PLEADING: TAXATION OF DOGS: STATUTES. In an action based on the provisions of section 18, article 1 of chapter 4 of the Compiled Statutes [Annotated Statutes, section 3219], against a county to recover damages alleged to have been sustained by reason of the loss of sheep killed by dogs, the plaintiff must allege that the county board, by resolution spread at large upon the records of its proceedings, imposed the proper tax, and provided the manner and conditions of payment to persons making claims against the fund created thereby. *McCullough v. Colfax County*..... 543

APPEAL AND ERROR. See CONTEMPT. CONTRACTS, 1. COURTS, 1-3. EVIDENCE, 11. EXCEPTIONS, BILL OF. ISSUES, 1, 2. JUSTICES OF THE PEACE, 1.. MORTGAGES, 11. UNPERSEDERAS. TRIAL, 23, 24.

1. **Assignments as to Motion for New Trial: PLEADING.** A judgment will not be reversed for errors which are required to be assigned on a motion for a new trial, unless it is alleged in the petition in error and shown by the record that the court erred in overruling such motion. *Coxe Bros. & Co. v. Omaha Coal, Coke and Lime Co.*..... 412
2. **Assignments as to Motion for New Trial: PLEADING: PRACTICE.** Where defendant challenges the court's attention to such defect in the petition in error, in his brief, and orally on the hearing, the above rule will be strictly adhered to. *Coxe Bros. & Co. v. Omaha Coal, Coke and Lime Co.* 412
3. **Assignments: EVIDENCE.** Assignments of error on account of receiving and rejecting evidence, although too general to require consideration, examined, and held not to contain reversible error. *Parkins v. Missouri P. R. Co.*..... 1
4. **Assignments: EXCEPTIONS, BILL OF, AND RULING ON MOTION FOR NEW TRIAL WANTING.** A plaintiff who has been defeated upon a trial in the court below by a general finding of issues of fact, upon petition, answer and reply, in favor of his adversary, and who prosecutes error without having preserved the evidence in a bill of exceptions, and without having obtained a ruling upon a motion for a new trial, can assign but one ground of error in this court, viz: that the answer does not state facts constituting a defense to the petition. *Beards v. McCloud* 729
5. **Assignments: FACTORS.** Assignments of error held without merit and frivolous. *Moore v. Jones* 319

APPEAL AND ERROR—Continued.

15. **Evidence Conflicting.** Where, in an action before of the peace, the evidence was conflicting and it be said that his judgment was clearly wrong, the the district court, on a proceeding in error, sustai judgment, will be affirmed. *Bullard v. Laughlin*..
16. **Evidence Conflicting: CRIMINAL LAW.** Where th on which a verdict is based, in a misdemeanor ca flicting, and it appears that the cause was submit jury under proper instructions, such verdict will aside unless we can say that it is clearly wro *son v. State*.....
17. **Evidence Conflicting: QUIETING TITLE.** A findi flicting evidence will be adhered to on appeal, un wrong. *Faulkner v. Sims*, — Neb., —, 94 N. W *Burton v. O'Connor*.....
18. **Evidence on Appeal.** On appeal to this court guished from proceedings in error, evidence excl trial court will not be considered. *Guthrie v. G*
19. **Evidence: RULINGS ON ADMISSION.** Rulings i court in the admission and exclusion of tes amined, and held, not error. *Fidelity Mutual I v. Lowe*.....
20. **Evidence Sufficient: PRESUMPTIONS.** In a trial where the finding is based upon sufficient comp it will be presumed that immaterial evidence garded. *Dewey v. Allgire*, 37 Neb., 6. *Arabia v. Bivens*.....
21. **Evidence Supports Findings: ACCOUNT.** Whe tion for an accounting, questions of fact only i and the trial court's findings are supported by the decree will not be disturbed. *Hastach v. W*
22. **Exceptions, Bill of: AUTHENTICATION.** A doc panying a transcript will be disregarded un cated by the certificate of the clerk of the i *Village of Holstein v. Klein*.....
23. **Exceptions, Bill of: CONTENTS: EVIDENCE.** is a bill of exceptions containing all the evide will not review the findings of fact in the *Emery v. Hanna*.....
24. **Exceptions, Bill of: FAILURE TO FILE: PLE** after issue joined, there has been a trial r recites that the plaintiff introduced all his e the trial court found to be insufficient and action, the judgment will not be reviewed i the absence of a bill of exceptions, although

APPEAL AND ERROR—Continued.

- that in the opinion of the trial judge the petition does not state facts sufficient to constitute a cause of action. *McCowan v. Votaw*..... 370
25. **Exceptions, Bill of, Wanting: EFFECT: PLEADING.** On an appeal from a decree of the district court where there is no bill of exceptions preserved and the record contains nothing but the clerk's transcript, we are only required to examine the record far enough to ascertain whether or not the pleadings are sufficient to sustain the decree. *Grove v. Dinsén*.. 722
26. **Exceptions, Bill of, Wanting: EFFECT: PLEADING.** In the absence of a bill of exceptions if the petition or pleading on which the decree is predicated contains sufficient statements of a cause, and a proper prayer for the relief thereby afforded, questions which necessitate a reference to the bill of exceptions will not be considered and an affirmance of the decree is proper. *Grove v. Dinsén*..... 722
27. **Exceptions, Bill of, Wanting: PRESUMPTIONS.** Where bill of exceptions is absent, the general presumption exists that every proceeding essential to the legality and validity of the judgment was validly taken. And where on any contingency supposable in the state of the record, the decision below might have been valid, such contingency will be so presumed. *Grove v. Dinsén*..... 722
28. **Exceptions, Bill of, Wanting: RULING BASED ON EVIDENCE.** The action of the district court in overruling a motion to dismiss an appeal for failure by the appellant to file a transcript in time will not be reversed where it appears that such ruling was based on evidence and the evidence has not been preserved and presented to this court by a bill of exceptions. *Hagadorn v. Wagoner*..... 713
29. **Findings: DISPUTED QUESTIONS OF FACT.** The findings of a trial court upon disputed questions of fact will not be disturbed if sustained by sufficient competent evidence. *Day & Free's Lumber Co. v. Bizby*..... 154
30. **Instructions Refused.** It is not error to refuse an instruction requested when instructions already given substantially cover the same ground. *Morgan v. Stone*..... 115
31. **Instructions: RULINGS IN GIVING AND REFUSING.** Rulings of the trial court in the giving and refusal of instructions examined, and held, not erroneous. *Fidelity Mutual Fire Ins. Co. v. Lowe*..... 159
32. **Instructions: VERDICT: ONLY ONE POSSIBLE.** In a case where a verdict is returned for the defendant, and is the only one which can be sustained, errors assigned by the plaintiff on account of giving and refusing instructions will

APPEAL AND ERROR—Continued.

- not be considered. *U. P. Steam Baking Co. v. Omaha Street R. Co.*..... 396
33. **Instructions: WAIVER OF ERROR.** Error of the trial court in the submission of an issue is waived if the party complaining, by a requested instruction, which was refused, asked to have the same issue submitted. *Farmers Mutual Ins. Co. v. Cole*..... 130
34. **Issues Changed on Appeal: TRANSCRIPT, WHAT MUST CONTAIN.** Alleged errors by reason of change of issues on appeal from the county court will not be reviewed unless the transcript shows that there was a judgment in and appeal from that court and sets forth the pleadings therein. *Walton v. Campbell*, 51 Neb., 788. *Kummer v. Dubuque Turbine and Roller Mills Co.*..... 347
35. **Issues in Appellate Court.** Pleadings in the county and district courts examined, and held not to present different issues. *Estate of Bennett v. Taylor*..... 800
36. **Jurisdiction: AFFIDAVITS PRESERVED IN BILL OF EXCEPTIONS.** Affidavits filed in support of objections to jurisdiction over the person, to be available in proceedings in error, must be preserved by bill of exceptions. *Gretch v. Maxfield*..... 256
37. **New Trial, Motion for: FAILURE TO FILE.** Where no motion for a new trial is filed in the court below, the action of the trial judge in admitting and excluding evidence will not be reviewed by this court. *Saling v. Estate of Saling*... 507
38. **New Trial, Motion for: NECESSITY FOR.** Alleged errors of a trial court in the admission and exclusion of testimony can only be reviewed in this court when they have first been called to the attention of the trial court by a motion for a new trial. *State v. Alstadt*..... 211
39. **New Trial, Motion for: VACATION OF ORDER OF CONFIRMATION.** In order to obtain a review of the ruling of the trial court in overruling a motion to vacate an order of confirmation, it is not necessary that a motion for a new trial alleging such ruling as error be first addressed to the trial court, and a ruling had thereon. *Linton v. Cathers*..... 641
40. **New Trial: MOTION FOR, WANTING: FINDINGS.** On a complaint in this court, that a decree is contrary to law, the question as to whether or not it is supported by the findings of fact in the lower court may be examined on error in the absence of a motion for a new trial, but the decree will not be set aside unless the findings as a whole show it clearly wrong. *Bemis v. McCloud*..... 731
41. **Pleading: MOTION TO MAKE MORE SPECIFIC: PREJUDICE.** Where the ruling of the trial court upon a motion to re-

APPEAL AND ERROR—Concluded.

- peal, but must be presented by petition in error. *Day & Frees Lumber Co. v. Bixby*..... 154
49. Trial: CROSS-EXAMINATION. Where misconduct of counsel is not charged, error can not be predicated upon the mere asking of a question upon cross-examination, to which no answer is made by the witness, although objection is made to the question and by the court overruled. *Farmers Mutual Ins. Co. v. Cole*..... 130
50. Trial Without Jury: INFERENCES OF FACT. Inferences of fact drawn by a trial court without a jury, will not be disturbed by this court unless clearly wrong. *Stocker v. Coddington* 229
51. Verdict Wrong. Where a verdict is clearly and manifestly wrong it will be set aside on error. *Jackson v. McNatt*.... 55
52. Waiver of Error. A party can not be heard to complain in the appellate court of an error which he has been instrumental in bringing about. *Farmers Mutual Ins. Co. v. Cole*.. 130

APPEARANCE.

Jurisdiction: OBJECTIONS SPECIFIC. A person appearing specially, for the purpose of making objections, must point out specifically the defects upon which he relies. Following *Brown v. Goodyear*, 29 Neb., 376. *Gretch v. Maxfield*..... 256

APPRAISAL. See ATTACHMENT, 12. MORTGAGES, 3-20.

APPROPRIATION. See HIGHWAYS, 5.

ASSESSMENTS. See INSURANCE, 5. TAXATION, 1, 2, 8, 17.

ASSIGNMENTS. See APPEAL AND ERROR, 1-10. CONVERSION, 1. JUDGMENT, 1. MECHANIC'S LIENS, 5.

Coupons Assigned to Third Party: EFFECT ON MORTGAGE. The detaching of interest coupons from a bond by the owner thereof and transferring them to a third party, operates as an assignment *pro tanto* of the mortgage which secures the entire debt. *New England Loan & Trust Co. v. Robinson*, 56 Neb., 50, 76 N. W. Rep., 415, followed and approved. *Curtiss v. McCune* 483

ATTACHMENT. See APPEAL AND ERROR, 11. TAXATION, 16.

1. Action on Bond: ALTERATIONS: FINDINGS: EVIDENCE SUFFICIENT. Evidence held to sustain the finding that the alterations were made by the purported signers before delivery. *Waller v. Deranleau*..... 497
2. Action on Bond: EVIDENCE: ADMISSIBILITY OF UNDERTAKING. An attachment undertaking in the body of which defendants' names appear as obligators is admissible in evidence although at the bottom appears the name of a bank-

ATTACHMENT—Concluded.

- ings of the trial court will not be disturbed unless clearly against the weight of the evidence. *Fremont Brewing Co. v. Pekarek* 531
10. **Dissolution of Prior: EFFECT ON SUBSEQUENT: CONTRIBUTION.** *First Nat. Bank of Pawnee City v. Wishard*..... 577
11. **Evidence Sufficient.** Evidence examined, and *held* sufficient to sustain the finding and order of the trial court. *Werner v. Linsenmeyer* 372
Fremont Brewing Co. v. Pekarek..... 531
12. **Levy: REQUISITES: APPRAISAL.** A levy of attachment by leaving at the attached premises a copy of the writ with a tenant and then going half a mile and getting one appraiser, and then going three-quarters of a mile farther to get another, and then telling them that a levy had been made on the lands in question and swearing them and making the appraisement, does not comply with section 205 of the Code, nor make a valid levy, it not appearing that the levy itself was in the presence of any witness. *Citizens State Bank of Wood River v. Porter*..... 73
13. **Process: SERVICE BY PUBLICATION: AFFIDAVIT SUFFICIENT.** Affidavit for publication of summons against a non-resident defendant examined, and *held* sufficient. *Barnes v. Boston Investment Co.* 349
14. **Process: SERVICE BY PUBLICATION: JURISDICTION: SUFFICIENCY OF AFFIDAVIT.** An objection that the court has not obtained jurisdiction of the person of the defendant does not present the question of the sufficiency of an affidavit for publication of the summons in an action of attachment. *Barnes v. Boston Investment Co.*..... 349
15. **Vacation of Order of Confirmation: EVIDENCE INSUFFICIENT.** Evidence examined, and *held* insufficient to sustain a ruling of the trial court on a motion to vacate an order of confirmation. *Linton v. Cathers*..... 641
16. **Wrongful: EVIDENCE SUFFICIENT.** Evidence *held* sufficient to sustain a finding that the attachment was wrongfully issued. *Waller v. Deranleau*..... 497

ATTORNEY AND CLIENT. See JUDGMENT, 15, 16.

BANKRUPTCY. See FRAUDULENT CONVEYANCES, 1.

BANKS AND BANKING. See TRUSTS, 1.

Mortgages: PURCHASE OF DECREE BY NATIONAL BANK: SPECULATION: INJUNCTION. *Smith v. First National Bank of Chadron*, 45 Neb., 444, followed. *Buchanan v. Saunders County Nat. Bank* 410

BILLS AND NOTES-

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EQUITY. See CHATTEL MORTGAGES, 2. CONTRACTS, 7. FRAUDULENT CONVEYANCES, 10. INSURANCE, 10-13. JUDGMENT, 17.

"Adequate Remedy at Law": INJUNCTION. The term "adequate remedy at law" means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Keplinger v. Woolsey*..... 282

ESTOPPEL. See COURTS, 2. MORTGAGES, 24, 26, 42, 43. MUNICIPAL CORPORATIONS, 11. TRIAL, 37.

EVIDENCE.

Conflicting. See APPEAL AND ERROR, 15-17. ATTACHMENT, 9. DEEDS, 2. EASEMENTS, 1. TRIAL, 15.

General. See APPEAL AND ERROR, 3, 18, 19, 21, 23, 28, 47. ATTACHMENT, 2, 4, 5. BILLS AND NOTES, 3. CONTRACTS, 2, 4, 6, 9, 11, 12. CREDITORS' SUIT. CRIMINAL LAW, 1, 2. DEEDS, 1. DETECTIVES. EASEMENTS, 2. EJECTMENT, 4. EXCEPTIONS, BILL OF. FORCIBLE ENTRY AND DETAINER, 1. FRAUD, 7. FRAUDULENT CONVEYANCES, 3. GAMING, 2. JUDGMENT, 2, 4, 10. MALICIOUS PROSECUTION, 4, 5. MORTGAGES, 1, 11, 36. NEGLIGENCE, 1, 3. NEW TRIAL, 2. PARTY WALLS, 2. PLEADING, 11. PRINCIPAL AND AGENT, 5. QUIETING TITLE, 2. RAILROADS, 2. REPLEVIN, 2. SALES, 1-4. TAXATION, 17. TRIAL, 2, 5, 8, 12-14, 16-19, 35, 38, 41. TRUSTS, 1. USURY.

Insufficient. See ATTACHMENT, 15. BILLS AND NOTES, 4. BREACH OF MARRIAGE PROMISE, 1. FRAUDULENT CONVEYANCES, 5, 11. HIGHWAYS, 7. INSURANCE, 1. MUNICIPAL CORPORATIONS, 2. PRINCIPAL AND AGENT, 6. STREET RAILROADS, 1, 2.

Sufficient. See ACCOUNT, ACTION ON. APPEAL AND ERROR, 11, 20. ATTACHMENT, 1, 11, 16. BASTARDY, 1. BILLS AND NOTES, 1. CONVERSION, 3. CROPS, 2. EJECTMENT, 1. FRAUD, 2. FRAUDULENT CONVEYANCES, 4, 10. HOMESTEAD, 7. INSURANCE, 12. LICENSES, 2, 3. MALICIOUS PROSECUTION, 1-3, 7. MECHANICS' LIENS, 7, 9. MORTGAGES, 7, 18, 27, 28, 37, 44. PRINCIPAL AND AGENT, 2. QUIETING TITLE, 1. RAILROADS, 3, 5. REPLEVIN, 4. SHERIFFS AND CONSTABLES, 2. TELEGRAPHS AND TELEPHONES. TRESPASS. TRIAL, 9, 10, 42.

1. **Absence of Deed:** INTRODUCTION OF RECORD. The record of a deed may be shown without inquiry as to the original whenever the evidence as a whole fairly indicates that the original is not in the possession or under the control of the party offering such proof. *Staunchfield v. Jeutter*..... 847

2. **Account Book of Decedent:** CHARGES BY HIM: ADMISSIBILITY: PREJUDICE. The admission in evidence of a book showing an account between a decedent and one who has filed a

EVIDENCE—Continued.

- claim against his estate, is not prejudicial error where all the items which the court allowed the jury to consider are charges made by the decedent against the claimant, even though the foundation for the admission of such book as a book of account has not been properly laid. *Estate of Bennett v. Taylor*..... 800
3. **Ambiguous Acts: INTENT.** Where a person's acts are ambiguous, and the effect thereof depends upon the intention with which they were done, he may testify as to his reason for doing them. *McCormick Harvesting Machine Co. v. Hiatt* 587
4. **Conclusive: SUBMISSION OF FACT TO JURY.** Where a material fact is conclusively established by the evidence, it is not error to omit or refuse to submit such fact to the jury. *Jessen v. Donahue*..... 838
5. **Declarations of Decedent: ADMISSIBILITY AGAINST CLAIMANT.** Declarations in his own favor made by a decedent in his will are not admissible in favor of his estate against a party filing a claim against the estate. *Estate of Bennett v. Taylor*..... 800
6. **Expert Testimony From Non-Expert Witness: ADMISSIBILITY.** Evidence examined, and held that an objection to a question put to a non-expert witness on a trial before a justice of the peace, which clearly called for his conclusion or opinion and not a statement of fact, was properly sustained. *Bullard v. Laughlin*..... 697
7. **Presumptions: LAWS OF FOREIGN STATES.** It is presumed that the laws of another state are the same as our own in absence of proof to the contrary. *Staunfield v. Jeutter*... 847
8. **Prima Facie: BILLS AND NOTES: PRODUCTION AT TRIAL: PAYMENT: REPLEVIN.** In an action in replevin by a mortgagee, the production at the trial, from the possession of the plaintiff, of the notes evidencing the debt and payable to him, is *prima facie* evidence that they have not been paid. *Heagney v. Case Threshing Machine Co.*..... 753
9. **Production of: CONTRACTS.** The particular place where witness put an executed contract after settlement with regard to it is immaterial where all the essential facts as to it and its custody are in evidence and undisputed. *Arabian Horse Co. v. Bivens*..... 823
10. **Record of Deed: WHEN PRIMARY: STATUTES.** Where the record of a deed is primary evidence, by virtue of section 13, chapter 73, Compiled Statutes [Annotated Statutes, section 10213], the rule that there are no degrees of secondary evidence does not apply. *Staunfield v. Jeutter*..... 847

FRAUD—Concluded.

person is obtained to a promissory note, which he is unable to read, by false and fraudulent representations, whereby he is induced to believe that he is merely signing a receipt, the note can not be enforced, even in the hands of a *bona fide* holder, where it appears that the maker was without any fault or negligence in signing the instrument. *Shenandoah Nat. Bank v. Gravette*..... 591

FRAUDS, STATUTE OF. See VENDOR AND PURCHASER.

Parol Acceptance of Written Offer: BROKERS. Parol acceptance of an offer in writing does not constitute a contract in writing subscribed by both parties within the purview of section 74, chapter 73, Compiled Statutes [Annotated Statutes, section 10258]. *Spence v. Apley*..... 358

FRAUDULENT CONVEYANCES. See CONTRACTS, 8, 11, 12. HOMESTEAD, 5.

1. **Bankruptcy: PREFERENCE WITHIN FOUR MONTHS: STATUTES.** In an action by a trustee in bankruptcy to recover, under section 60 of the bankrupt law, the amount of a preference given within four months of the filing of a petition in bankruptcy, *held* error to instruct the jury that it is sufficient to prove that the defendant had reasonable cause to believe the bankrupt was insolvent "or that it was acquainted with facts as to the condition of said company that would lead to a reasonable doubt of its solvency." *Farmers & Mechanics Bank of Havelock v. Wilson*..... 606
2. **Consideration.** A deed for \$300, by one much involved financially, to his brother-in-law of property worth admittedly \$1,000, and probably more, which the latter conveys the following day to the grantor's wife in consideration of \$250, is not for a sufficient valuable consideration as against the grantor's creditors. *Omaha Brewing Ass'n v. Zeller*..... 198
3. **Consideration: HUSBAND AND WIFE: EVIDENCE.** Evidence examined, and *held* to show that the consideration for the conveyance of a certain city lot moved from the husband and that the title thereto was taken in the name of the wife, for the purpose of placing it beyond the reach of the creditors of the former, and of hindering and delaying them in the collection of their debts. *Kearney County Bank v. Duquoy*..... 735
4. **Consideration: UNDOE INFLUENCE. EVIDENCE SUFFICIENT.** Evidence contained in the bill of exceptions examined and *held*, that the consideration for the conveyance sought to be set aside for fraud and undue influence, was adequate. *Tilley v. Struck*..... 597

FRAUDULENT REPRESENTATIONS. See FRAUD, 7, 8. LAND-
LORD AND TENANT.

FREEHOLDERS. See MORTGAGES, 6, 8.

GAMING.

1. **Wagers: CONTRACTS: NOTICE OF REPUDIATION.** It is not necessary that a defendant, who asserts that the contract sued on is a wagering contract and unenforceable as such, give notice to the other party of his intention to repudiate the contract. *Merrill v. Garver*..... 830
2. **Wagers: EVIDENCE OF PURCHASER'S ABILITY TO HANDLE GRAIN.** On an issue whether a contract for the purchase of 20,000 bushels of wheat was a wagering contract, evidence that the alleged purchaser was not a miller or dealer in grain and had no use for or means of handling the grain purported to be purchased, that he was an electrical engineer of small means, and that the alleged seller had reason to know that he had no property or means to enable him to meet the purchase price of such an amount of grain, or any reasonable proportion thereof, is admissible. *Merrill v. Garver*..... 830

GUARANTY. See BILLS AND NOTES, 6. MORTGAGES, 44.

HIGHWAYS. See COUNTIES, 1. EASEMENTS, 1, 2.

1. **Consent Road: PROCEEDINGS OF BOARD.** Proceedings of the county board of county commissioners examined, and held insufficient to establish a consent road. *Horn v. Williamson*, 763
2. **Damages: ACTION FOR: DEFENSE: EMINENT DOMAIN.** The fact that the person who owned the land when the resolution was adopted, asked leave to present a claim for damages, which request was refused by the board, and an attempted appeal from such refusal has been dismissed, is no defense to an action, by the owner of the land at the time the road was actually opened, to recover his damages therefor. *Hogsett v. Harlan County*..... 810
3. **Damages: EMINENT DOMAIN: CONSTITUTION.** Section 21 of article 1 of the constitution provides that private property can not be taken or damaged for public use without just compensation. Therefore a landowner can not be required to surrender his land for a public road until his damages are first ascertained, and either paid or proper provision made for their payment. *Hogsett v. Harlan County*..... 810
4. **Damages: WHEN ACCRUE: EMINENT DOMAIN.** Damages for lands appropriated for a highway accrue at the date of the condemnation proceedings, without regard to the time when the road is actually opened. Following *Harlan County v. Hogsett*, 60 Neb., 362. *Hogsett v. Harlan County*..... 809

INSURANCE—Concluded.

18. **Membership During Negotiations: ACTS OF AGENT: LIABILITY OF PRINCIPAL.** The holder of a certificate of insurance in a mutual insurance company under the act of 1891, while in legal theory he is a member of the company, does not become such until the policy is issued; but during the negotiations for insurance, the agent of a mutual company stands upon the same basis as the agent of a stock company, and his acts are equally binding upon his principal. *Fidelity Mutual Fire Ins. Co. v. Lowe*..... 159
19. **Principal and Agent: PAYMENT TO AGENT: CANCELLATION OF POLICY.** Where a policy is issued and sent to a soliciting agent who has only limited power to bind the company, to be delivered by him to the insured, and is accompanied by a statement of the amount due as the advance assessment or premium, which is not remitted, the company may cancel the policy, after due notice of the fact of non-payment and of its intention to do so has been given to the agent and the assured, notwithstanding such agent, without its knowledge, may have money in his hands belonging to the assured out of which he had agreed to pay the premium. *Merchants & Manufacturers Mutual Ins. Co. v. Baker*..... 384
20. **Statutes: CONSTITUTIONALITY.** Section 45, chapter 43, Compiled Statutes, 1899 [Annotated Statutes, section 6476], is constitutional. *Farmers & Merchants Insurance Co. v. Dobney*, 62 Neb., 213, 86 N. W. Rep., 1070, adhered to. *Farmers Mutual Ins. Co. v. Cole*..... 130
21. **Statutes: CONSTITUTIONALITY: CONTRACTS.** Section 45, chapter 43, Compiled Statutes, 1899 [Annotated Statutes, section 6476], is constitutional and valid. *Lancashire Insurance Co. v. Bush*, 60 Neb., 116. *Lansing v. Commercial Union Assurance Co., Limited*..... 140

INTENT. See EASEMENTS, 2. EVIDENCE, 3. FRAUD, 6. FRAUDULENT CONVEYANCES, 13. HOMESTEAD, 1. LIBEL AND SLANDER, 2.

INTEREST. See BILLS AND NOTES, 5. MORTGAGES, 55. PARTITION, 4.

INTOXICATING LIQUORS. See CRIMINAL LAW, 1, 3. DETECTIVES.

- 1 **Mandamus to Compel Hearing:** Record examined, and held to show no error, and that the writ of mandamus was rightly granted by the district court. *Moore v. State*..... 781
- 2 **Remonstrance: FORM: FILING. STATUTES.** A protest addressed to a board empowered to grant saloon licenses was sent by mail and received prior to any action granting the license protested against. The board took cognizance of the same and ordered it preserved in the files of its office.

JUDGMENT—Continued.

- necessary to support it as between the parties to it. *Citizens State Bank of Wood River v. Porter*..... 73
5. **Execution in District Court on Appeal: CLAIMS AGAINST ESTATE.** The judgment of a district court, entered on an appeal taken from the county court in the matter of a claim filed against the estate of a decedent, should not award the issuance of an execution to satisfy the judgment. *Estate of Bennett v. Taylor*..... 809
6. **Mandate: PRESUMPTIONS AS TO DISTRICT COURT.** On a showing of time and opportunity to do so the presumption obtains that a district court has performed its duty in entering such judgment as is required by the terms of a mandate from this court. *Abbott v. Lane*..... 629
7. **Mistake in Rendering: COLLATERAL ATTACK.** Where a court has power to grant the relief sought in a proper case, a mistake in doing so, in an improper but similar case, will not render the entire proceedings void and subject the judgment to a collateral attack. *Fergus v. Gagnon*..... 25
8. **Modified.** Third and fourth paragraphs of the syllabus in former opinion modified. *Bauer v. Taylor*.....701, 710
9. **Not on Merits.** A judgment which disposes of a controversy otherwise than upon the merits is not available on a plea of *res judicata*. *Walsh v. Walsh*..... 683
10. **Res Judicata: COLLATERAL ATTACK: EVIDENCE IMPEACHING: EJECTMENT.** The court having jurisdiction of the parties and the subject-matter in a former action, the judgment therein is conclusive and is not subject to collateral attack when introduced in another proceeding involving the same matters between the same parties, and evidence offered for the purpose of impeaching its validity was properly excluded. *Miles v. Ballantine*..... 171
11. **Res Judicata: INSTRUCTION APPROVED: EJECTMENT.** Held, That an instruction by which the jury were told that the judgment in a former suit, which was introduced in evidence, was binding upon the plaintiffs, and was a bar to their prosecution of this suit, was properly given. *Miles v. Ballantine* 171
12. **Res Judicata: PARTIES AND SUBJECT-MATTER IDENTICAL.** Where the claim or demand involved in a suit is identical with the claim or demand in a former action, and the parties to both suits are practically the same, the judgment in the former action constitutes an absolute bar to the prosecution of the latter. *Miles v. Ballantine*..... 171
13. **Res Judicata: QUESTION DIRECTLY INVOLVED.** A judgment of a court of competent jurisdiction upon a question directly

JUDICIAL SALES—Concluded.

necessarily against public policy where the whole transaction was not intended to, and did not in fact, have the effect to chill bidding, and was known to the officers conducting the leasing. *State v. Follmer*..... 376

JURISDICTION. See APPEAL AND ERROR, 36, 46. APPEARANCE, ATTACHMENT, 8, 14. CHATTEL MORTGAGES, 2. COUNTIES, 1. COURTS, 1, 2, 4, 5. INFANTS, 1, 2. JUSTICES OF THE PEACE, 2. MORTGAGES, 22, 30. PLEADING, 8. TAXATION, 2.

JURY. See APPEAL AND ERROR, 50. DAMAGES. TRIAL, 29, 35.

Challenge for Cause: PRIOR SERVICE WITHIN TWO YEARS: TRIAL. It is sufficient cause of challenge to any person called as a juror in the district court that he has been summoned and served as a juror in that court at any term held within two years prior to the time of such challenge. The statute giving the right of challenge was particularly aimed at what are known as professional jurymen. *Figg v. Donahoe*..... 661

JUSTICES OF THE PEACE.

1. **Appeal and Error: FILING TRANSCRIPT: DISMISSAL.** An appeal from a judgment of a justice of the peace will not be dismissed for the reason that the appellant failed to file a transcript within thirty days from the date of the judgment where such failure did not occur through the fault or neglect of the appellant. *Continental Building & Loan Ass'n v. Mills*, 44 Neb., 136. *Hagadorn v. Wagoner*... 713
2. **Jurisdiction: PARTIES IN DIFFERENT COUNTIES: JOINDER COLLUSIVE: SUMMONS: JUDGMENT.** Where there is a collusive joinder of defendants in an action before a justice of the peace for the sole purpose of bringing a suit against a person in a county where he does not reside, a summons issued in such action to another county for the purpose of bringing in a defendant residing therein is void, and confers no jurisdiction on the court to render a default judgment against such a defendant. *Stroudbridge v. Miller*.... 449
3. **Preliminary Examination: RECORD CONCLUSIVE: BASTARDY: STATUTES.** In a proceeding under chapter 37, Compiled Statutes, the record of the justice of the peace before whom the preliminary examination was had, showing that the examination was regularly had and completed, is conclusive upon the question. *Morgan v. Stone*..... 115

LACHES. See PROCESS, 2.

LANDLORD AND TENANT. See FORCIBLE ENTRY AND DETAINER, 2.

Rent, Action for: DAMAGES RECOUPED FOR FRAUD. A lessee who has been induced by the fraudulent representations of

LANDLORD AND TENANT—Concluded.

the lessor to enter into a lease, may, in an action by the landlord for rent, recoup the amount of the damages suffered by him by reason of the fraud. *Bauer v. Taylor*.... 701

LAST CLEAR CHANCE. See NEGLIGENCE, 4.**LAW OF THE CASE.** See TAXATION, 14.**LIBEL AND SLANDER.** See DAMAGES.

1. Instructions Approved. Instructions in an action for slander examined and approved. *Whiting v. Carpenter*.... 342
2. Intent. It is not necessary in such an action to show that the words complained of were uttered with the intent to injure and defame plaintiff. *Whiting v. Carpenter*..... 342

LICENSES

1. Duty of Licensor to Licensee: DAMAGES: PERSONAL INJURIES. Where one enters upon the premises of another with his consent but without an invitation and not in the discharge of any public or private duty, he is a bare licensee and the occupier of the premises owes no duty to him as long as no wanton or willful injury is inflicted upon him by the licensor or his servants. *Chesley v. Rocheford & Gould* 768
2. Personal Injuries: EVIDENCE SUFFICIENT. Plaintiff's evidence examined, and held to show that he was at the time of the injury complained of a bare licensee on defendant's premises. *Chesley v. Rocheford & Gould*..... 768
3. Personal Injuries: EVIDENCE SUFFICIENT. Evidence examined, and held to sustain the former conclusion that plaintiff was a bare licensee on the premises where he was injured, who took the risk of them as he found them. *Chesley v. Rocheford & Gould*..... 777

LIENS. See CROPS, 1. HOMESTEAD, 3, 4. MORTGAGES, 1, 2, 24, 41. PARTITION, 2. SUPERSEDEAS. TAXATION, 1, 16. TRUSTS, 2.

LIMITATION OF ACTIONS. See FRAUD, 5. MUNICIPAL CORPORATIONS, 1. PARTITION, 5. SUPERSEDEAS.

1. Adverse Possession: MEANING OF STATUTE. It has for many years been the established doctrine of this court that the statute of limitations, with reference to real property, is neither a statute of presumptions nor one of repose, but that the continued, exclusive, open, notorious and adverse possession of lands for the period of limitations operates, of itself, as a grant of all adverse titles and interests to the occupant. *Postal v. Martin*..... 534
2. When a Good Defense. The defense of the statute of limitations, if available at the time of the commencement of the original action, is a good defense. *Stowbridge v. Miller*... 449

MORTGAGES—Continued.

8. Foreclosure: APPRAISAL: GRANTER OF DEED AS FREEHOLDER. Where the return to an order of sale under foreclosure recites that the appraisers were freeholders, the order of confirmation will not be reversed on appeal because one of the appraisers is shown not to have received a deed for his land, he having purchased the same and, apparently, residing thereon. *Wheldon v. Cornett*..... 421
9. Foreclosure: APPRAISAL: OBJECTIONS. Objections made to an appraisement and sale of real estate under a decree of foreclosure examined, and held to show no valid objections to the same. *Hartwick v. Woods*..... 103
10. Foreclosure: APPRAISAL: OBJECTIONS AFTER SALE. *Gardner v. Hagerman*..... 596
11. Foreclosure: APPRAISAL: OBJECTIONS: EVIDENCE: PREJUDICE: APPEAL. Where the evidence offered in support of the objections is of such a character as to warrant a finding that the irregularities complained of were without prejudice to the party resisting confirmation, an order overruling such objections and confirming the sale will not be disturbed on appeal. *Union Savings Bank v. Lincoln Normal University*.. 70
12. Foreclosure: APPRAISAL: OBJECTIONS, HOW MADE. Objections should be made in such language as to indicate with reasonable certainty the specific objections relied upon. *Union Savings Bank v. Lincoln Normal University*..... 70
13. Foreclosure: APPRAISAL: OBJECTIONS, TIME FOR. *Murray v. Romine* 31
14. Foreclosure: APPRAISAL: OBJECTIONS TOO GENERAL. In the sale of real estate, under a decree of foreclosure, an objection that the appraisement "is irregular and not in accordance with law," is too general to merit consideration. *Bird v. McCreary*..... 183
15. Foreclosure: APPRAISAL: OBJECTIONS, WHEN MADE. Objections to the appraisement of property to be sold at judicial sale, to be available, must be made before the sale. *Union Savings Bank v. Lincoln Normal University*..... 70
16. Foreclosure: APPRAISAL: QUALIFICATION OF APPRAISERS: RECEIVER. The mere fact that the two appraisers have given evidence on plaintiff's behalf as to the value of the property at the trial of the action in which the sale is had and in a hearing as to the appointment of a receiver for it, does not disqualify them to act as appraisers. *Adler & Sons Clothing Co. v. Hellman*..... 557
17. Foreclosure: APPRAISAL: SALE. *Wilson v. Neu*..... 348
18. Foreclosure: APPRAISAL: VALUATION: EVIDENCE SUFFICIENT. Evidence on the question of the value of the premises ex-

MORTGAGES—Continued.

- where the amount of a tax lien, which has not been mentioned or included in the decree, has been deducted from the gross appraised value of the property by the appraisers, and the purchase is made for less than two-thirds of the gross appraised value, upon the assumption that such taxes are a valid lien, the purchaser taking advantage of the deduction thereof will be presumed to have undertaken to pay such taxes, and will not be heard to deny their validity in an equitable proceeding seeking to enjoin their collection. *Omaha Savings Bank v. City of Omaha*..... 563
27. Foreclosure: DEED ABSOLUTE ON FACE: EVIDENCE SUFFICIENT. Evidence examined, and held sufficient to sustain the decree of the trial court. *Eckmann v. Turner*..... 404
28. Foreclosure: DEFICIENCY: COVERTURE: EVIDENCE SUFFICIENT. Evidence examined, and held sufficient to sustain the ruling of the trial court denying the motion for a deficiency judgment. *Morris v. Linton*..... 550
29. Foreclosure: DEFICIENCY: COVERTURE: PLEADING: BURDEN OF PROOF. Where a deficiency judgment is sought against a married woman, who denies that the note and mortgage upon which the judgment is sought were executed by her or any one legally representing her, and that she never received any consideration for the note, the burden is upon the plaintiff to show facts which will create a personal liability of the defendant. *Morris v. Linton*..... 550
30. Foreclosure: DEFICIENCY: RENDERED AT SUBSEQUENT TERM: JURISDICTION. Prior to the passage of the act of 1897, relative to judgments for deficiency in actions for the foreclosure of mortgages, the court did not lose jurisdiction to render such a judgment by failure to exercise it at the term at which the sale of the mortgaged premises was confirmed. *Sawyer v. Bender*..... 304
31. Foreclosure: DEFICIENCY: SET-OFF AND COUNTER-CLAIM: WASTE. In an action to recover a deficiency after foreclosure of a mortgage, the mortgagor may set up, by way of counter-claim, damages sustained by reason of waste committed by the mortgagee in possession. *Staunchfield v. Jetter*..... 347
32. Foreclosure: DEFICIENCY: STATUTES: CONSTRUCTION: ELECTION OF REMEDIES. Section 848 of the Code of Civil Procedure, as amended by the act of 1897, when taken in connection with the remainder of the title of which it is a part, is a statute compelling an election of remedies and is inoperative upon a suit begun before it went into effect. *Provident Life & Trust Co. of Philadelphia v. Brunner*..... 48

MORTGAGES—Continued.

40. Foreclosure: FOR PART OF DEBT: IRREGULARITIES: CORRECTION. Error or irregularity in foreclosing a mortgage as to interest coupons only, subject to the principal note, the record showing that the principal note was held by the plaintiff and was due, can be availed of only in direct proceedings for that purpose. *Nebraska Loan & Trust Co. v. Haskell*..... 330
41. Foreclosure: FOR PART OF DEBT: LIENS. The foreclosure of a mortgage for the interest only on the principal debt secured thereby, where the whole debt, both principal and interest, is due and payable at the time of such foreclosure, ordinarily exhausts the lien of the mortgage, and is a bar to a second foreclosure suit. *Nebraska Loan & Trust Co. v. Doman*..... 334
42. Foreclosure: FOR PART OF DEBT: SUBJECT TO BALANCE: DECREE AS BAR TO SECOND FORECLOSURE: ESTOPPEL. But where the decree in such former suit specifically provides that it is subject to the mortgage lien for the principal debt, and that the sale shall be made subject thereto as a first lien, the parties to the record are estopped to plead the decree as a bar to a second foreclosure to obtain the payment of said principal sum. *Nebraska Loan & Trust Co. v. Doman*.. 334
43. Foreclosure: FOR PART OF DEBT: SUBJECT TO BALANCE: REDEMPTION: ESTOPPEL TO COMPLAIN OF IRREGULARITY IN DECREE. Hence where a decree foreclosing a mortgage as to certain coupon notes expressly provided that the amount due on said coupon notes was a lien subject to the amount of the principal note, then due, which was a first lien, and ordered a sale subject to the first lien of such principal note, and the mortgagor redeemed before sale, neither he nor a subsequent purchaser of his interest may question the regularity of the provision in the decree thereafter nor assert that the decree operated to extinguish the entire lien. *Nebraska Loan & Trust Co. v. Haskell*..... 330
44. Foreclosure: GUARANTY: EVIDENCE SUFFICIENT. Evidence examined, and held sufficient to support the judgment of the trial court. *Anderson v. Hall*..... 494
45. Foreclosure: LIEN PAID BY STRANGER: HUSBAND AND WIFE: SECOND MARRIAGE VOID: SUBROGATION. The property was incumbered by a valid mortgage lien; plaintiff loaned S. money with which the lien was paid off and, in good faith, took a mortgage on the property executed by S. and the woman with whom he was living, as husband and wife. Held, That plaintiff has a lien on the property for the money loaned and so used, either by virtue of his mortgage or that by subrogation, he has such lien by virtue of the lien so

MUNICIPAL CORPORATIONS—Concluded.

but they do not change the rule. *Village of Atkinson v. Fisher* 21

11. **Taxation: INJUNCTION: DEDUCTION OF TAXES FROM PURCHASE PRICE: ESTOPPEL.** That the vendee of real estate deducted from the agreed purchase price certain taxes levied against the property, would not estop him from denying the validity of such taxes in an action to restrain their collection, in the absence of an agreement, between himself and his vendor, that such amount should be retained and applied on the taxes. *City of Omaha v. Gaantner*..... 53

NEGLIGENCE. See FRAUD, 7, 8. **MUNICIPAL CORPORATIONS, 4-6.**
RAILROADS, 5.

1. **Contributory: EVIDENCE: INSTRUCTIONS: PREJUDICE.** Erroneous instructions upon the subject of contributory negligence are without prejudice if the plaintiff's evidence does not disclose contributory negligence and no evidence sufficient to establish it was adduced by the defendant. *City of South Omaha v. Fennell*..... 427
2. **Damages: RAILROADS.** The conclusion reached in the former opinion, *Chicago, B. & Q. R. Co. v. Lilley*, ante, page 286, 93 N. W. Rep., 1012, adhered to. *Chicago, B. & Q. R. Co. v. Lilley*..... 300
3. **Instructions as to Degree: EVIDENCE SUPPORTS FINDINGS.** While no degrees of negligence are recognized in this state and the use in instructing a jury of the word "slight" to characterize either negligence or contributory negligence is not approved, where the finding of the jury is amply supported by evidence, a judgment will not be reversed on account of such use of the word. *Kitzberger v. Chicago, R. I. & P. R. Co.*..... 324
4. **"Last Clear Chance": DAMAGES: RAILROADS.** The rule known as the doctrine of the "last clear chance," as it has been adopted in some of our sister states, is in conflict with the law respecting contributory negligence as it has been settled by a long series of decisions by this court, and it will not be enforced in this state. *Chicago, B. & Q. R. Co. v. Lilley*..... 286
5. **When Question of Law for Court: DAMAGES: RAILROADS.** Without attempting an exact definition of what is, perhaps, not precisely definable, it may be said generally that when a person whose conduct is being considered has not been called upon suddenly and unexpectedly to choose, without time for deliberation, between two or more ways of escaping from imminent danger, and his course is such that its probable consequences may be predicted from the common and

PARTITION.

1. **Accounting: DUTY OF TRIAL COURT TO STATE ACCOUNT CONCISELY.** When an action in partition involves an accounting of transactions between the parties extending over a long series of years it is the duty of the trial court, by himself or a referee, to state the account giving the items or classes of items and sums credited and charged to the respective parties and the facts in his opinion affording a reason therefor, so that this court may form a judgment as to whether the conclusion reached is justified by the law and the evidence. *Hanson v. Hanson*..... 880
2. **Mortgage by Tenant: LIEN ON INTEREST OF COTENANT.** In an action for partition, in which it appears that the legal or record title is, and has been, in one of the tenants in common and that he has encumbered the property for his own benefit and advantage, it is error to charge the incumbrance as a lien upon the aliquot interest of his cotenant. *Hanson v. Hanson*..... 880
3. **Tenancy in Common: ACCOUNTING: PARTNERSHIP.** When in an action for partition, it appears that the parties in interest are not tenants in common, merely, but are partners in the land, it is proper, upon an accounting, to charge either party with the value of his individual use and occupation of the premises. *Hanson v. Hanson*..... 880
4. **Tenancy in Common: IMPROVEMENTS: REIMBURSEMENT: INTEREST.** A tenant in common who discharges incumbrances or makes lasting and valuable improvements upon the property under circumstances entitling him to reimbursement, is entitled to interest upon moneys expended in so doing. *Hanson v. Hanson*..... 880
5. **Transactions Not Ended: LIMITATION OF ACTIONS.** The transactions between the parties with respect to the land in question having extended over a long term of years and appearing not yet to have ended, the statute of limitations is not pleadable. *Hanson v. Hanson*..... 880

PARTNERSHIP. See PARTITION, 3.

PARTY WALLS.

1. **Covenant for Compensation: RUNNING WITH LAND.** A promise by an adjoining lot-owner to the builder of a party wall to compensate him for the use thereof is personal to the promisee and not a covenant running with his land, and where the builder's lot is conveyed to one party and the party wall agreement assigned to another, the latter is entitled to the sum due under such agreement. *Cook v. Paul*.. 93
2. **Damages: CONTRACTS: EVIDENCE.** In an action by the first builder under a party wall agreement against his grantees

PLEADING—Continued.

3. **Bona Fides: NOTICE: INSTRUCTIONS: PREJUDICE: BILLS AND NOTES.** Where no issue as to the *bona fides* of the transfer and want of notice on the part of the indorsee is raised by the pleadings, error in instructing the jury that a promissory note, containing an agreement to pay exchange on the principal sum, is non-negotiable, is without prejudice. *Bovier v. McCarthy*..... 490
4. **Conditions Performed: STATUTE GIVING NEW REMEDY.** In an action based purely on a statute which gives a new remedy and prescribes prerequisite conditions, facts must be alleged in the complaint showing the performance of these conditions, and it is insufficient to allege in general terms that the plaintiff has performed all the necessary conditions on his part. *McCullough v. Colfax County*..... 543
5. **Contemporaneous Contract: DEMURRER.** An answer which sets forth a contemporaneous agreement varying the terms of a written contract which is the subject of the suit, but from which it does not appear, either expressly or by necessary intendment, that such agreement was oral, is not obnoxious to a general demurrer. *Tablet & Ticket Co. v. Le Feber* 105
6. **Inconsistent Allegations in Answer: ELECTION: WAIVER.** In case the allegations of an answer are inconsistent, the proper remedy is by motion to require an election; unless such a motion is made, the objection is waived. *McCormick Harvesting Machine Co. v. Hiatt*..... 587
7. **Mistake: AMENDMENTS: AFTER HEARING: DISCRETION.** Refusal of leave to amend answer after a hearing, and set up mistake in a settlement, an exercise of sound discretion where the evidence, as a whole, did not show any such mistake. *Arabian Horse Co. v. Bivens*..... 823
8. **Petition: TITLE: AMENDMENTS. JURISDICTION.** Entitling a petition "In District Court of Douglas County" when it is prepared for and filed in the county court, is an amendable defect, and does not prevent jurisdiction attaching when summons is duly served and returned, the defect corrected and pleadings to the amended petition filed by the defendant. *Rosewater v. Horton*..... 203
9. **Petition: WHAT IT MUST CONTAIN.** A petition which does not allege that the defendant has violated any law or contract, or caused any injury or done any wrong or withheld any right or been guilty of any negligence or has threatened or is about to do any such thing, does not state a cause of action. *Sands v. Gund*..... 316
10. **Reply, New Matter In.** It is only in those cases in which the answer contains issuable new matter, that new matter is

PRINCIPAL AND AGENT. See COLLEGES AND UNIVERSITIES. INSURANCE, 1-4, 18, 19. PLEADING, 11.

1. Authority of Agent: LIABILITY OF PRINCIPAL. In the absence of restrictions upon the agent's powers known to those who deal with him, his acts within the apparent scope of his authority will bind the principal. *Day & Frees Lumber Co. v. Bizby*..... 151
2. Authority of Agent: MECHANICS' LIENS: WAIVER OF RIGHT TO: EVIDENCE SUFFICIENT. Evidence examined, and held sufficient to sustain the finding that the agent had power to waive the right to a mechanic's lien. *Day & Frees Lumber Co. v. Bizby*..... 154
3. Disclosure of Agency: LIABILITY OF AGENT. An agent who fails to disclose the fact of his agency but represents himself as principal, leading a stranger to deal with him as such, will be liable as principal. *Jackson v. McNatt*..... 55
4. Disclosure of Agency: RECOVERY OF PAYMENT: VENDOR AND PURCHASER. A vendee under an executory contract for the sale of land paid to the agents of the vendor \$100 cash, \$2,400 to be paid upon delivery of the deed to the premises. The receipt for the cash payment was signed "E. J. W. per W. & J." The vendee also took from the agents an order upon the tenant to deliver to him the crops for the current year, which order was signed "W. & J., Attorneys for E. J. W." There was also delivered to vendee a lease from E. J. W., the owner, to G. A., a tenant, signed by "E. J. W. by W. & J. his agts. & Attys," upon the back of which was an assignment of the rights of E. J. W. in the lease to vendee, the same being signed by "E. J. W. by W. & J., his attys." Vendee rescinded, and within a few days after payment of the \$100 cash, brought an action in Iowa against E. J. W. Held, That in an action against the agents for the recovery of the cash payment after rescission, the unsupported testimony of vendee that one of the defendants had stated at the time of making the contract that he owned the greater part of the land, and that E. J. W. did not have an interest therein, which testimony was denied by defendants, was insufficient to charge the defendants as principals. *Jackson v. McNatt*..... 55
5. Fraud of Agent: CONTRACTS: CORPORATIONS: EVIDENCE. *Barber v. Martin*, 67 Neb., 445, 93 N. W. Rep., 722, followed and approved. *Barber v. Krug*..... 439
6. Set-off and Counter-claim: EVIDENCE INSUFFICIENT. Evidence examined, and held insufficient to support the verdict. *New Orleans Coffee Co. v. Hutchinson*..... 679

PRINCIPAL AND SURETY. See ATTACHMENT, 7.

RAILROADS—Concluded.

3. **Fires: DAMAGES: EVIDENCE SUFFICIENT.** Evidence examined, and held sufficient to sustain the judgment of the trial court. *Chicago, B. & Q. R. Co. v. Beal*..... 510
4. **Operation: DAMAGES: KNOWLEDGE OF DANGER BY INJURED.** A track man on a railroad, whose opportunities to observe any of the dangers incident to his employment are as good as are those of his foreman, is not at liberty to rely upon the foreman entirely for his safety. He should call attention to dangers observed by him. *Kitsberger v. Chicago, R. I. & P. R. Co.*..... 324
5. **Personal Injuries: DAMAGES: NEGLIGENCE CONTRIBUTORY: DIRECTING VERDICT: EVIDENCE SUFFICIENT.** Upon the evidence disclosed by this record, the action of the district court in directing a verdict for the defendant is approved. *O'Keefe v. Chicago, B. & Q. R. Co.*..... 787

RECEIVER. See **APPEAL AND ERROR**, 45. **MORTGAGES**, 16, 56.

1. **Creditors' Suit: APPEAL BY PLAINTIFF.** A plaintiff in a creditors' bill, who has been awarded a sale of lands but appeals from the decree because it refuses him any right against personal property, will not be refused the appointment of a receiver in the action on the ground that the lands have been conveyed by the judgment debtor subject to all its debts and liabilities. *Benedict v. T. L. V. Land and Cattle Co.*..... 471
2. **Creditors' Suit: APPEAL BY PLAINTIFF.** Neither will such a creditor be refused a receiver merely because his remedy by sale of the land is suspended by his own appeal. *Benedict v. T. L. V. Land and Cattle Co.*..... 471
3. **Objections to Appointment: HOMESTEAD: ABANDONMENT: RETRIAL OF OBJECTIONS ON MOTION FOR DISCHARGE.** An application for the appointment of a receiver was resisted on the ground, among others, that the premises sought to be placed in charge of the receiver was the homestead of the defendants. One of the issues tried was the abandonment of the homestead by the defendants and the court found in favor of the plaintiff and appointed a receiver with directions to take possession of the premises. Subsequently the defendants moved the court for an order discharging the receiver on the sole ground that the premises placed in his charge was their homestead. *Held*, That the question of the homestead right of the defendants having been determined on the hearing for the appointment, it could not be again raised on a motion to discharge the receiver and that the court properly denied the motion. *First Nat. Bank of Sutton v. Ashley* 126

RETURN. See **MORTGAGES**, 1.

SALES.

1. **Consent of Seller and Buyer: EVIDENCE.** The consent of both the vendor and the vendee is essential to a sale; but the consent of either may be inferred from all the facts and circumstances surrounding the transaction. *Curtiss v. McGuns* 483
2. **Contracts of: EVIDENCE.** An instrument signed by two parties reciting that one has sold to the other property, the title to which is shown by extrinsic proof to be at the time in the latter, is not conclusive evidence of a contract of sale. *Mansinger v. Steiner-Medinger Co.* 392
3. **Coupons Sold by Indorsee of Bond: EVIDENCE: PAYMENT.** The facts and circumstances surrounding the transfer of certain coupons by the indorsee of the bond to which they were attached, examined, and held to show a sale and not a payment of such coupons. *Curtiss v. McGuns* 483
4. **Evidence: ADMISSIBILITY: TELEGRAPHS AND TELEPHONES.** Action of the trial court in the admission of evidence examined and approved. *Lincoln Mill Co. v. Wissler* 675
5. **Title: VALIDITY.** It is essential to a valid sale that the party purporting to sell should have title to the subject-matter. *Mansinger v. Steiner-Medinger Co.* 392
6. **Warranty: PLEADING BREACH: RETENTION OF GOODS: SET-OFF AND COUNTER-CLAIM: RESCISSION: TENDER.** In an action for the purchase price of goods sold and delivered, where the sale was induced by statements and representations amounting to a warranty of kind and quality, the defendant may retain the goods, plead a breach of warranty and counter-claim his damages; or, he may rescind the sale by returning or offering to return the goods, and plead such rescission and tender as a complete defense to the action. *Sloan Commission Co. v. Fry & Co.* 647
7. **Warranty: RESCISSION: RETURN OR TENDER OF GOODS: PLEADING.** Where a party relies on a rescission of the sale for his defense he must plead the same, and allege that he has returned, or offered to return, the goods; and an answer which fails to allege such a rescission and return or tender, does not state a defense. *Sloan Commission Co. v. Fry & Co.* 647

SCHOOLS AND SCHOOL DISTRICTS.

1. **New Districts: TAXATION: LIMITATION OF.** School District No. 40 was created by the county superintendent, a part of its territory being taken from district No. 1. The superintendent found that district No. 40 should receive from

TAXATION. See ANIMALS. HOMESTEAD, 3, 4. MORTGAGES, 4, 26, 56. MUNICIPAL CORPORATIONS, 1, 11. SCHOOLS AND SCHOOL DISTRICTS, 1, 2.

1. **Assessments Against Subsequent Owner: ENFORCEMENT OF LIEN.** Where personal property has been held out as belonging to a non-resident person or corporation, with the owner's and the other party's knowledge and consent, if, while the treasurer has the tax list and warrant for the collection of the tax, the person to whom it was assessed becomes the owner, the lien of the taxes will attach to the property and may be enforced against a purchaser. *Franklin & Co. v. Layport*..... 636
Franklin & Co. v. Thackery..... 636
2. **Assessments: JURISDICTION: INJUNCTION.** While jurisdiction to make special assessments must appear to authorize a valid assessment, one seeking to enjoin a village board from making such assessments must, at least, show that on the face of the record some jurisdictional fact is wanting. *Bemis v. McCloud*..... 731
3. **Counties: PURCHASE BY BOARD: CANCELLATION.** A county board, after having purchased real estate for delinquent taxes in the manner provided by law, can not cancel or rescind the sale without the full payment of the taxes, penalties, interest and costs on account of which the same was made. *Kelly v. County of Dawes*..... 49
4. **Counties: PURCHASE BY BOARD: FORECLOSURE: WHEN AC- CUES.** Article 4 of chapter 77 of the Compiled Statutes, en- titled "Revenue," is a complete regulation concerning the en- forcement of tax liens purchased by counties, and an action to foreclose such liens can not be begun until the expira- tion of two years from the date of sale. *Kelly v. County of Dawes*..... 49
5. **Distress Warrant: INJUNCTION: RAILROADS.** *Chicago, B. & Q. R. Co. v. County of Custer*, — Neb., —, 95 N. W. Rep., 860, followed and approved. *Chase County v. Chicago, B. & Q. R. Co.*..... 635
6. **Equalization: APPEAL AND ERROR: REVERSAL: DUTY OF DIS- TRICT COURT.** Where error is prosecuted to the district court from an order of the board of equalization by the com- plainant, and such order is reversed, the district court may order the board to reconvene for the purpose of hearing the complaint. *County of Sarpy v. Clarke*..... 87
7. **Equalization: CONSTITUTIONAL LAW: CONSTRUCTION.** Sec- tion 4, article 9 of the constitution, has no reference to such changes in an assessment as may be necessary to a just and fair equalization. *County of Sarpy v. Clarke*..... 87

8. **Equalization: DENIAL OF RELIEF REDUCTION OF ASSESSMENT.** A board of equalization should not deny relief in a case of that kind on the ground that to lower assessment of a complainant would reduce the aggregate assessment. *County of Sarpy v. Clarke*.....
9. **Equalization: PLEADING.** In a complaint filed before a board of equalization by one aggrieved by the excessive valuation of his land, it is not necessary to allege that all lands in the precinct have been assessed too low. *County of Sarpy v. Clarke*
10. **Equalization: PLEADING.** It is not necessary that such a complaint be drawn with the precision of a pleading in a court of record; it is sufficient if it shows that the complainant considers himself aggrieved and that his property has been assessed too high. *County of Sarpy v. Clarke*.....
11. **Equalization: QUESTION INVOLVED IN PLEADING.** The question presented by a complaint that the property of the complainant has been assessed too high is not whether it has been assessed above its fair value but whether the valuation placed upon it bears a just relation to that placed upon other property of its kind in the precinct. *County of Sarpy v. Clarke*.....
12. **Foreclosure: CERTIFICATES OF LIENS' REQUISITES.** Under a statute requiring an officer to certify liens to the sheriff of property about to be sold at judicial sale, it is sufficient if the general character of such liens be stated in the certificates. *Orcutt v. Polesky*, 59 Neb., 576. *Whelen v. Stillwell*.....
13. **Foreclosure: DEPOSIT BY PURCHASER.** Rule No. 24 of the district court for Douglas county, which requires bidders at judicial sales to deposit \$50 with the sheriff as evidence of their good faith, is a reasonable one. *Green v. Deane*, 29 Neb. [Unof.], 818, and *Cummings v. Hart*, ante, page 10, approved and followed. *Whelen v. Stillwell*.....
14. **Foreclosure: LAW OF THE CASE.** This case having been decided upon a former appeal upon substantially the same facts and on the same legal issues, the former decision is binding as that now before us, the former decision is applied to. *Merrill v. Van Camp*
15. **Foreclosure: SURPLUS RIGHTS OF FIRST MORTGAGEE.** The record of proceedings examined, and held to show no reversible error. *Brockway v. Humphrey*
16. **Homestead Claimant in Possession: LIENS, JUDICIAL SALE, ATTACHMENT, AGAINST SURPLUS.** The rule that the holder of a limited or partial interest must pay taxes while in possession, as between himself and the remainderman, does not apply to a homestead claimant in possession of a tract

TRIAL—Continued.

2. **Contracts: ORAL EVIDENCE TO EXPLAIN.** Oral testimony may be introduced for the purpose of explaining an ambiguity in a written instrument. *Fidelity Mutual Fire Ins. Co. v. Murphy* 578
3. **Cross-Examination: COLLATERAL MATTERS: SUBSEQUENT CONTRADICTION.** When a witness is cross-examined on a matter collateral to the issue he can not, as to his answer, be subsequently contradicted by the party putting the question. *Johnston v. Spencer*, 51 Neb., 198, followed. *Burke Co. v. Fowler*..... 123
4. **Cross-Examination: COLLATERAL MATTERS: TEST.** The test of whether a fact inquired of in cross-examination is collateral is, would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea? *Johnston v. Spencer*, 51 Neb., 198, followed. *Burke Co. v. Fowler*..... 123
5. **Cross-Examination of Witness: RESTRICTION OF: EVIDENCE.** Bill of exceptions examined, and held that the court did not err in restricting the cross-examination of a witness, and in striking out a part of such cross-examination. *U. P. Steam Baking Co. v. Omaha Street R. Co.*..... 396
6. **Cross-Examination: STRIKING IRRESPONSIVE ANSWER.** It is not error to strike out an irresponsible answer given on cross-examination, especially when it has no relation to the issues in the case. *Arabian Horse Co. v. Bivens*..... 823
7. **Damages: EXCESSIVE: PERSONAL INJURIES.** An award of \$3,000 damages for a broken leg which was skillfully set and "formed a good union" in the ordinary course, and is not shown to have resulted in any permanent injury beyond what is usually involved in such an accident, held excessive. *City of South Omaha v. Fennell*..... 427
8. **Directing Verdict: EVIDENCE.** A trial court should not instruct a jury to return a verdict for either party where, under the evidence, there is any doubt about the propriety of such action; but where the duty to do so is plain it should be performed without hesitation. *U. P. Steam Baking Co. v. Omaha Street R. Co.*..... 396
9. **Directing Verdict: EVIDENCE SUFFICIENT.** Where the evidence without contradiction establishes the right of one party to an action to a judgment, it is not error for the trial court to direct a verdict accordingly. *McCluneghan v. Norton* 309
10. **Directing Verdict: EXECUTORS AND ADMINISTRATORS.** Record examined, and held to show no error on the part of the trial court, and that it properly directed a verdict for defendant

TRIAL—Continued.

- in error. *Estate of Wolcott v. McCormick Harvesting Machine Co.*..... 766
11. **Directing Verdict: Submission to Jury.** In an action at law where the right to recover depends upon testimony from which reasonable minds might draw different conclusions, the cause should be submitted to the jury. But where only one conclusion can be drawn from the evidence, the court should direct a verdict. *Olesley v. Rocheford & Gould*.... 768
12. **Evidence: Admissibility.** Action of the trial court in admitting evidence examined, and held proper. *Jensen v. Steiber*..... 237
13. **Evidence: Admissibility.** Rulings of the trial court on the exclusion of evidence, held erroneous. *Bauer v. Taylor*.. 710
14. **Evidence: Admissibility.** Rulings of the trial court upon the exclusion of testimony examined, and held not error. (Reversed on rehearing.) *Bauer v. Taylor*..... 701
15. **Evidence Conflicting: Directing Verdict.** Where the evidence on a material act is conflicting, and different minds might draw different conclusions or inferences therefrom, it is error for the court to direct a verdict for either party. *Pope v. Whitcomb*..... 251
16. **Evidence Indirect: Competency.** Evidence is not to be rejected necessarily because it does not bear directly upon the issue; if it tends reasonably to establish the fact in controversy by strengthening the probabilities upon one side, and is otherwise competent, it should be received. *Chamberlain v. Chamberlain Banking House*..... 278
17. **Evidence: Verdict Correct: Error in Rulings: Prejudice.** Where, under all the evidence, the plaintiff must recover, errors in rulings upon requests for instruction are without prejudice. *City of South Omaha v. Fennell*..... 427
18. **Evidence: Verdict for Plaintiff: Costs Taxed to Defendant.** Under the undisputed evidence in this case, held that the plaintiff was entitled to recover the sum of \$30 with legal interest to the date of judgment, and the costs should have been taxed to the defendant. *McEldon v. Patton*..... 269
19. **Inspection of Books or Papers: Discretion: Evidence: Statutes: Construction.** Under section 394, Code of Civil Procedure, the granting of orders for inspection of books or papers is left to the discretion of the trial court, and it is also left to the discretion of the court whether or not to exclude such books or papers at the trial if inspection is not permitted. *Chamberlain v. Chamberlain Banking House*, 278
20. **Instructions: Assuming Existence of Fact.** The giving of an instruction which assumes the possible existence of a

TRIAL—Continued.

- he will not be permitted to withhold such knowledge from the court during the trial, allow the case to be submitted to a jury and thus speculate upon the verdict. By such conduct he will be held to have waived his right to a new trial on that ground, unless he satisfy the court that the juror, as a matter of fact, was prejudiced against him thereby, and could not render a fair and impartial verdict in the case. *Parkins v. Missouri P. R. Co.*..... 1
38. **Pleading Affirmative Defense: EVIDENCE: INSTRUCTIONS.** Where an affirmative defense is set out in an answer and evidence tending to support such defense is given on the trial, the court should call the attention of the jury to that phase of the case by a proper instruction. *Figg v. Donahoo.* 661
39. **Pleading: AFTER DEMURRER: WAIVER OF ERROR.** An assignment of error in overruling a demurrer to an answer is not available where the plaintiff afterwards replied to the answer. *Emery v. Hanna.*..... 491
40. **Questions of Fact: MECHANICS' LIENS.** Whether a claim on which a mechanic's lien was based, was sold to another by the contractor prior to his perfecting such lien; and whether the last work on the building was done for the sole purpose of extending the time for filing a lien, or was performed in good faith under the agreement for the erection of the structure and to complete the contract according to its terms, are purely questions of fact. *Bankers' Building and Loan Ass'n v. Williams.*..... 795
41. **To Court: EVIDENCE.** In a cause tried to a court, a judgment will not be reversed for admission of incompetent evidence when the judgment is sustained by sufficient competent evidence. *O'Brien v. Kluever.*..... 571
42. **Varianc: EVIDENCE SUFFICIENT: PERSONAL INJURIES.** Record examined, and held, that there is no variance between the allegations and proof, and the verdict is sustained by sufficient evidence. *City of South Omaha v. Taylor.*..... 757
43. **Verdict Containing Surplus Words: COSTS.** The trial court has no right to refuse to receive a verdict which responds to the issues and is sustained by sufficient evidence because it contains the words "and plaintiff to pay all costs." The question of costs is one of law for the court, and such words are merely surplusage. *McEldon v. Patton.*..... 259
44. **Verdict: OBJECTIONS, WHEN MADE.** Objections relating merely to the form of a verdict must be made at the time of its rendition. *Whiting v. Carpenter.*..... 342
45. **Verdict Only One Possible: PREJUDICE.** Where the verdict reached is the only possible one under the facts, errors in the trial are not prejudicial. *Carlson v. Jordan.*..... 359

USURY—Concluded.

the usury as well as that he purchased before maturity and for a valuable consideration. *Bovier v. McCarthy*..... 490

VACATION. See APPEAL AND ERROR, 39. ATTACHMENT, 15. INFANTS, 1, 2. JUDGMENT, 3, 15-18. NEW TRIAL, 1.

VALUATION. See MORTGAGES, 18-20. REPLEVIN, 1.

VARIANCE. See TRIAL, 42.

VENDOR AND PURCHASER. See FRAUDULENT CONVEYANCES, 5-7. HUSBAND AND WIFE. PRINCIPAL AND AGENT, 4.

Frauds, Statute of: MORTGAGE FOR PRE-EXISTING DEBT: PRIORITIES. A vendee in good faith and for a valid and sufficient consideration of chattels which are left in the possession of the vendor under such circumstances as to satisfy the requirements of the statute of frauds, has a right superior to that of a creditor who subsequently obtains them in pledge to secure the payment of a pre-existing debt. *Dexter v. Citizens' Nat. Bank of Norfolk*..... 380

VERDICT. See APPEAL AND ERROR, 32, 51. EJECTMENT, 6. TRIAL, 35.

WAGERS. See GAMING, 1, 2.

WAIVER. See APPEAL AND ERROR, 32, 52. CONTRACTS, 10. CRIMINAL LAW, 3. INSURANCE, 16, 17. MORTGAGES, 21. PLEADING, 6, 11. PRINCIPAL AND AGENT, 2. TRIAL, 39. WARRANTY, 2.

WARRANTY. See CONTRACTS, 9, 10. FRAUD, 1. SALES, 6, 7.

1. Breach by Warrantor: RELIEF: CONTRACTS. Contract of warranty examined, and held that on breach thereof by the vendor and warrantor the only relief allowed the vendee was to return the article sold and reclaim the consideration. *Heagney v. Case Threshing Machine Co*..... 745

2. Waiver: NOTICE OF DEFECTS: CONTRACTS. Where a contract of warranty provides for notice of defects in the article sold, to be given to the vendor, and that "any assistance rendered by the company, its agents or servants in operating or in remedying any actual or alleged defect, either before or after the ten days' trial, shall in no case be deemed a waiver of, or any excuse for any failure of the purchaser to keep and perform the conditions of this warranty." Held, That notice to an agent of the company of defects in a machine obtained from assisting in setting it up and trying to make it work, was not such notice as complied with the conditions of the warranty. *Heagney v. Case Threshing Machine Co*..... 745

WASTE. See MORTGAGES, 31.





